88-1535

Supreme Court, U.S.
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No. 88-

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CALVIN L. PARKER, et al,

Petitioner,

v.

CONNORS STEEL COMPANY, H. K. PORTER COMPANY, INC.; AND UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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March, 1989

QUESTIONS PRESENTED

1. When a court of appeals finds that a district court has violated 28 USC Section 455(a) by knowingly assigning a law clerk to review massive discovery materials, hold a hearing in the absence of the judge and "formulate" the court's opinion granting summary judgment in favor of the defendants, in a case wherein the law clerk's father, a former clerk of the same district judge, is a principal partner in the law firm representing the defendants, may the court of appeals nevertheless directly address the merits of the summary judgment in the defendants' favor and refuse to grant the plaintiffs any relief, holding that the Section 455(a), and possible 455(b)(5)(iii), violation, are harmless error because the court of appeals agrees with the district court's order granting summary judgment?

2. Does 28 USC 455(b)(5)(iii), which would automatically disqualify a judge whose father is a lawyer in a case, also disqualify a district court judge who authorizes his law clerk, whose father is a senior partner in the law firm representing the defendants, to review massive discovery materials, hold a hearing in the absence of the judge and "formulate" the court's opinion granting summary judgment in favor of the defendants?

3. When a district judge is in violation of Section 455(b)(5)(iii), which requires mandatory recusal of the judge, and the judge hears the case and grants summary judgment for the defendants, is the judge's failure to recuse himself merely "harmless error" and without remedy on appeal where the court of appeals addresses

the merits of the district court's summary judgment order and agrees with the district judge's ruling.

4. Whether summary judgment is properly granted in favor of defendant labor Union on a failure of fair representation claim when there is substantial evidence before the court that the Union, urging ratification of a wage and benefit concession intentionally misrepresented to its members the concession provisions in order to secure a favorable ratification vote from the members.

5. Whether summary judgment is properly granted in favor of defendant labor union on a failure of fair representation claim when there is substantial evidence before the district court that the Union negotiated drastic wage and benefit concessions to the Company for the alleged purpose of saving the Company sufficient money to keep it from closing, when the Union failed to negotiate any financial standard which, if attained, would oblige the Company to remain open, failed to examine the books, records, and internal reports of the company to determine if there was a reasonable possibility that the Company would continue its operation if the requested concessions were granted, and, in violation of its own standard procedures and against the advice of its research director, knowingly failed to require pay back of the concession if the Company closed its operation despite the concessions.

6. Whether summary judgment is properly granted in favor of defendant Company on breach of contract and fraud claims by union members against the Company when there is substantial

evidence before the court that the Company obtained wage and benefit concessions in wages and benefits from union members by misrepresenting to said union members that the concessions might make it financially possible for the Company to continue operations, when in fact the Company had decided prior to requesting or obtaining said wage and benefit concessions not to continue operating the company and had decided not to make the necessary investments to keep the Company open.

THE PARTIES BELOW

The parties are Calvin L. PARKER; Gene A. Childers; Maple L. Copeland; Will Goodman; Nathaniel Grant; Thomas Ray Loveless; Ruben I. Pierce; Joe D. Pressley; Virgil Lee Weatherspoon, on their own behalf and on behalf of all other hourly wage employees of Connors Steel Company similarly situated, and as representatives of a class of persons consisting of those employees who on or after June 1, 1982, were employed as hourly wage earners by Connors Steel Company and represented by the United Steelworkers of America, AFL-CIO and its Local Union No. 2250, and CONNORS STEEL COMPANY; H. K. Porter Company, Inc.; and United Steelworkers of America, AFL0-CIO, CLC, and Carl L. Statum; Tom Kimbrell; and James E. Norman.

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Amalgamated Ass'n of Street Employees v. Lockridge
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OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is printed as Appendix A. The memorandum of opinion of the United States District Court for the Northern District of Alabama, Southern Division is printed as Appendix C.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered September 29, 1988. The timely petition for rehearing by the petitioners was denied by the Eleventh Circuit Court of Appeals on December 14, 1988 (Appendix E). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

STATUTES INVOLVED

28 U.S.C. Section 455 (Appendix R), the National Labor Relations Act, Section 7 and Section 8, 29 U.S.C. 151, et. seq., and the Labor Management Relations Act, Section 301, 29 U.S.C. 141, et. seq.

STATEMENT OF THE CASE

Petitioners note that this is a complex case with massive discovery. Space limitations prevent review of more than a minimal illustrative sampling of the evidence which establishes many genuine disputes of material fact which make summary judgment inappropriate. The 28 USC 455(a) and 455(b) questions overshadow any finding to the contrary.

On August 31, 1983, the defendant, Connors Steel Company, a wholly owned subsidiary of H. K. Porter Company, terminated its operations. Connors had previously operated two plants, one in Huntington, West Virginia, and one in Birmingham, Alabama. Plaintiffs were hourly employees among the 600 at the Birmingham plant and members of the United Steelworkers of America, the bargaining unit representative. [1]

In the spring of 1981, Porter and Connors (hereinafter the Company) represented to the Steelworkers (hereinafter the Union) that because of its financial condition the Huntington plant would be closed unless the Union granted the Company an extension of the existing contract. This concession was made.

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[1] Plaintiffs sought class certification. The district court refused,in clear violation of **Eisen v. Carlisle & Jacquelin**, 417 U.S. 156, 177-178, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974), to certify a class of all hourly wage employees because of his perceived lack of meri. to the claims asserted.

Nevertheless, the Huntington plant was closed, the announcement being made in May of 1982. (App. P, pp. 1-2).

The Company then represented that unless wage and benefit concessions were made, the Birmingham plant would be closed. (App. N, pp. 72, 78, 83-84). The employees voted to accept benefit concessions ("Concession I"), including a 20% wage reduction. (App. Q, p. 6). In February, 1983, the Company represented that unless additional wage and benefit concessions were made, it would close the Birmingham plant. The employees voted for a second concession ("Concession II"), which included another 20% wage reduction. (App. S,)

Negotiations began in May of 1983 for a new collective bargaining agreement. A number of new concessions were demanded by the Company, including for the first time that the Company have the unilateral right to cancel any contract on thirty days notice. (App. K, pp. 138-144). The employees refused and the Company closed the Birmingham plant.

Plaintiffs claim that the Company made the decision to close before the first concessions were demanded and that the purpose of the concessions was to reduce the cost of closing Connors.

THE COMPANY FRAUD

On June 1, 1982, the Company represented it was losing

money and asked for concessions. The Union, without verifying financial data, recommended the concessions.[2]

In the spring of 1982, the Company employed an expert, Brown, to evaluate Connors.[3] The Company concealed the report. It provides three "Scenarios." The first, to continue the operations of Connors during the first six months of 1982 **with no further capital investment:**

> "Scenario I offers nothing. With the break even at eighty percent of capacity, only best economic conditions can provide profit. And the business is too sensitive to market variations beyond the control of Connors. Continuing changes in market prices, controlled by seemingly irresponsible action of some mini-mill operators, will always keep Connors in a condition of feast or famine without ever knowing what the immediate future will bring. **The risks are too great to continue operations."** (Emphasis supplied) (App. U, 17). Scenario II is really a holding operation to provide a tee-off point whenever the Company is ready to go ahead with the Scenario III plan. A near-term revival of the economy would produce significantly better profit results than those projected because of additional volume. But, with-

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[2] At the meeting of June 1, 1982, it was agreed that Union auditors could examine Connors' books to verify the information presented by Connors and Porter. No effort was made by the Union to do so. The only financial data ever examined by the Union research department prior to Concession I was a packet of Company produced in-house unaudited balance sheets and income statements. (App. M, pp. 1,2, 9). However, the Union intentionally misrepresented to the employees that it had examined all relevant financial data and that Connors was in fact in the claimed financial difficulty. This was not true as Connors was in good financial condition at that time. (App. T, pp. 1,2)

[3] (BROWN REPORT) (Received by the Company about August 31, 1982).

> out time to consolidate the changes needed in attitude and practice to assure continuation of the thirty percent proportion of Class II product, **the business could be expected to revert to Scenario I with its inherent weakness.** (App. U, p. 17) (Emphasis supplied)

Scenario III, the only viable option, required an investment of $14.6 million dollars during 1983 through 1985 to make Connors a viable company. (App. U, p. 14).[4] Mr. Keith Garrity, president and chief executive officer of Porter, admitted the Company never made the decision to make the investment. (App. K, pp. 5-7).

The Company again asked for concessions in a fraudulent letter to the employees dated February 9, 1983:

> "Please understand that if you do not authorize them [the Union] to enter into negotiations, you are in effect saying to your Committee and to us that you are not willing to make any concessions whatsoever **to keep Connors in operation**. If this is your decision — and we sincerely hope that it is not — then we are obligated to inform you that Connors will have no alternative but to cease operations." (Emphasis supplied.) (App. V, pp. 1-2).

Garrity admitted in a memorandum dated October 4, 1982, that he knew it was impossible for wage and benefit concessions to be obtained in an amount sufficient to reduce Connors' losses to a break even point. He pointed out that if the losses in September

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[4]The Brown Report does establish that Connors was viable if the necessary investment and the concentrated effort was made. Only Mr. Garrity "required" the closing of Connors.

of 1982 were divided by the number of employees, each employee would have to give up wages for that month in the average amount of $1,354.17 "Some employees would receive zero (-0-) pay for the month." (App. L p. 1).

THE UNION FAILURE OF FAIR REPRESENTATION

The Union made no effort to negotiate any financial standard which, if attained, would oblige the Company to keep Connors open; it did not examine the books and records of Connors until after Concessions I and II were executed; it never asked if there was a study such as the Brown Report; contrary to its own standard procedures, it failed to require return of the benefits and wages conceded if the plant closed; it lied to the employees to secure ratification of the concessions.

Oliver Montgomery, the Union official in charge of examing Connors' records, never examined any, relying only on summaries from the Company; he testified that the 1981 financial performance of Connors justified concessions, though Connors made a profit of $3,520,294.00 in 1981 (App. M, p. 9); he testified independent CPA's were not sent to examine the books until after the Concession II agreement was executed, because "it wasn't deemed necessary, that is all I can say." (App. M, pp. 10-11); he

testified the Birmingham plant was "going obsolete," apparently unaware that $12,000,000.00 had been invested in plant and equipment in 1980. (App. M, pp. 11-12).

James Smith, assistant to the Union president, was in charge of the negotiations. Smith sent a letter to Statum, the local Union representative, eight days after the Concession I agreement had already been signed, telling him not to accept the agreement in that form. (App. W, p. 1). Neither Statum or Smith ever tried to correct the omissions in the Concession I agreement and **allowed the same omissions in the Concession II agreement.** Smith warned Statum in the letter:

> "Specifically, Carl, the memo [Concession I Agreement] is **deficient** on two points, which are as follows:
>
> 1. Paragraph (1) on page 1 suspends certain benefits which are not yet effective and restores them on August 28, 1983, unless a new agreement is reached before that date. However, items 8A through 8E on page 7, reduce **quite drastically** wages and benefits which the members currently enjoy. **There is no provision whatsoever in your agreement for the restoration of those wages and benefits which are referred to in paragraph 8 if a new agreement is not reached by August 28 1983.** I do not, of course, know whether this is an oversight or deliberate, **I think it is a serious mistake.**
>
> 2. Far more important than the problem with item (1) above is the problem of paragraph 4A on page 3. 4A defines "suspended benefits."

The definition limits the term to include only those wages and benefits which have been deferred, postponed, delayed, reduced or affected by the provisions of **Paragraphs 1 and 3 above.** This definition because it makes no reference to paragraphs 8A through 8E on page 7, means that when the workers receive the 23 cents an hour and COLA increase scheduled to become effective hereafter, they will not receive the 20 percent wage cut of paragraph 8A nor will they receive any reimbursement for the holidays and vacations sacrificed under paragraph 8A. **Carl, I do not see how we can agree, at this time, to take enormous pay cuts out of people's wages in a steel mill, under a contract which is currently in effect, and tell them that they are never going to get the money back no matter how profitable the Company may become in the future.** [5]

Accordingly, unless Thermon convinces President McBride otherwise, I think it is necessary to correct the agreement with respect to item (2) above, before it is signed to President McBride.

Again, of course, this could simply be an oversight. If so, the Company should have no trouble agreeing to correct it. However, if you have actually agreed to that then I think we have a serious problem that we need to discuss at your earliest convenience. (Emphasis supplied) (App. W, pp. 2,3).

Statum, in violation of Union policy, never submitted the proposed Concession II agreement to the Union International office for review before he signed it. (App. O, pp. 1-2).

Statum wrote a letter on February 16, 1983, to the employ-

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[5]The problem pointed out by Smith clearly became intentional fraud by the Union on the plaintiffs when the Union told the employees that they would get the money back. (See Appendix X, p. 2).

ees which contained the following intentional misrepresentation:

> If we can turn this negative situation around, we have negotiated a payback plan that **insures** you will have returned to you every penny in wages and benefits you are sacrificing now. (Emphasis supplied) (App. X, p. 2).

This was an absolutely false statement and the Union knew it. There is nothing in Concession II that "insures" a repayment of any money. (See Concession II, App. S, pp. 1-6). The employees, not knowing this letter contained absolute falsehoods, voted in favor of Concession II which became effective February 24, 1983. (App. S, pp. 1-6).

The district court granted a summary judgment to all the defendants on all claims. (App. B, p. 1). In the opinion explaining the summary judgment, the district judge stated:

> For the formulation of this opinion, the Court is indebted to its Law Clerk, William G. Somerville, III, for his careful analysis of the massive discovery materials and his countless discussions with the Court as to how the law should be applied to the material facts as to which there is no genuine issue. (App C, p. 7).

William G. Somerville, III, is the son of William G. Somerville, Jr., one of the partners in the law firm representing both Connors Steel Company and H. K. Porter Company in this litigation. (App. A, p. 23).

William G. Somerville, Jr., was also a law clerk to Judge Lynne as the court of appeals noted in its opinion. (App. A, p. 23) The court found:

> We now turn to the objective facts that might reasonably cause an objective observer to question Judge Lynne's impartiality. First, the close familial relationship between Judge Lynne's law clerk and a senior partner in the firm representing Connors and H.K. Porter might lead an objective observer, especially a lay observer, to believe that Connors and H.K. Porter will receive favorable treatment from the district judge. This is compounded by the observation that William G. Somerville, Jr., is a former law clerk to Judge Lynne.

The attorneys for the plaintiffs did not associate the name of the law clerk with that of his father until the memorandum explaining summary judgment was published. (App. A, p. 26). A motion to recuse the district judge was filed immediately when the relationship was realized. (App. A, p. 26).

It is undisputed that in addition to reviewing the voluminous discovery materials and determining that there were no material issues of fact that would preclude summary judgment, the law clerk actually held a hearing with counsel in the absence of the judge as to the legal positions of the parties and later reported the results of the hearing to the judge. The court of appeals found that there was no dispute that such a hearing had been held by the

law clerk.[6]

The district judge denied the plaintiffs' motion to recuse him under 28 U.S.C. 455(a) and (b), without hearing.

THE HARMLESS ERROR RULE DOES NOT APPLY TO VIOLATIONS OF 28 USC 455(a) WHEN THE JUDGE IS AWARE OF THE DISQUALIFYING FACTS

The court of appeals correctly found that the district judge violated 28 USC 455(a), but erroneously applied the harmless error rule to the wrongful failure of the district judge to recuse himself because it agreed with the merits of the district judge's decision to grant a summary judgment.

The court of appeals believed that because, "The district court dismissed the case on summary judgment," it was in "as good a position to determine the merits of the employees' [plaintiffs] claims as was the district court." Since it agreed with the merits of the decision granting summary judgment, "It would, therefore, be ridiculous to remand this case and reassign it to another judge after we have already exercised plenary review and have concluded that summary judgment was proper." (App. A,

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[6] "There does not appear to be any dispute over the fact that Somerville held a hearing in order to determine the legal positions of the parties." And, "Finally, we believe that when Somerville held a hearing in Judge Lynne's absence and later reported the results of the hearing to the judge this contributed to the appearance of impropriety." (App. A, p. 23).

p. 27).

The only authority cited for this proposition is the case of **Liljeberg v. Health Services Acquisition Corporation**, 468 U.S. _____, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988). In **Liljeberg,** the court of appeals had earlier affirmed the district judge's decision on the merits, but both the United States Court of Appeals for the Fifth Circuit and the United States Supreme Court were of the opinion that the merits of the ruling were immaterial to the question of whether the case should be reversed and sent to another judge.

In **Liljeberg** the district judge whose conduct was questioned ruled in favor of a litigant so as to ultimately benefit Loyola University, even though it was not a party to the litigation. The judge was a member of the Loyola Board of Trustees. The Fifth Circuit affirmed the decision. The losing party found out ten months later that the judge was a Loyola trustee and moved under Federal Rule of Civil Procedure 60(b)(6) to vacate the judgment on the ground that the district judge was disqualified under 455(a).

The Fifth Circuit vacated the previously affirmed decision and ordered the case heard by another judge on remand. This Court affirmed.

The court of appeals in the instant case held that the proper

remedy for a violation of 455(a) depends on "1) the risk of injustice to the parties in the particular cases; 2) the risk that the denial of relief will produce injustice in other cases; and 3) the risk of undermining the public's confidence in the judicial process." (App. A, p. 26). The court concluded in this case no remedy was necessary.[7]

First, it held there was no risk of injustice to the plaintiffs because it agreed with the district judge's ruling on summary judgment and it reviewed the merits of that decision **de novo**. Thus, a summary judgment, the most publicly suspect of all possible means of disposing of a case, is exempted from the operations of 28 USC 455 altogether, a most anomalous result.[8]

Second, the court of appeals held that "we do not believe that denying relief in this case will produce injustice in other

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[7]The court of appeals also held that "it would be unfair to deprive the Company and the Union of their judgment under the circumstances in this case." (App. A, p. 28). This is insupportable since the Company knew of the facts constituting the 455(a) violation while the plaintiffs did not, and kept silent.

[8] The court of appeals applied this rationale to violations of both 455(a) and 455(b)(5)(iii). The effect of this ruling is to make the remedy where a district judge improperly fails to recuse himself under Sections 455(a) or 455(b)(5)(iii) in a case in which he grants summary judgment against the party entitled to the recusal turn on whether or not the court of appeals agrees with the granting of summary judgment. This simply nullifies the application of 28 U.S.C. Section 455 in summary judgment cases. Obviously, if the court of appeals does not agree with the district court granting summary judgment, then the court of appeals is obligated to reverse the judgment without reference to whether or not there is a Section 455 violation.

cases." Two grounds for this belief were stated. First, "Provided Judge Lynne refrains in the future from using law clerks to hold hearings with counsel or using law clerks whose impartiality might be questioned, there is no risk of injustice in future cases." Second, "since this case was decided on summary judgment our decision will not produce any injustice in future cases." (App. A, p. 28).

Judge Lynne was already the subject of a 455(a) opinion from the court of appeals on the dangers of using law clerks with a special relationship to one of the law firms in a case when he did it again in the instant case. In **Phillips v. Amoco Oil Company**, 799 F. 2d 1464 (11th Cir. 1986), another summary judgment case, the losing party "claimed that an appearance of impropriety arose when the law clerk who had drafted Judge Lynne's memorandum opinion accepted employment with the firm representing [the prevailing party] **prior to drafting the opinion**." (Emphasis supplied)(799 F. 2d at 1467). The court of appeals excused this because the losing lawyers knew some months earlier that the law clerk had accepted employment with these lawyers. The losing party argued that it did not know the clerk had drafted the opinion until it was issued and recited this fact.

The summary judgment was entered in the instant case on

July 31, 1987, long after the **Phillips** opinion was issued, yet that opinion did not seem to have any effect on Judge Lynne's practices relative to "interested" law clerks working on opinions in summary judgment cases. What is the basis for the present optimism? The Eleventh Circuit now holds that where it agrees with a district judge on a summary judgment, there is no harm done by allowing a law clerk related to the winning lawyers to work on the case, analyze massive discovery and even hold hearings with the lawyers in the absence of the judge. Since Judge Lynne would not grant a summary judgment he does not believe is correct, the instant opinion seems unlikely to promote change.[9] Such a rule of law must raise the appearance of impropriety in the mind of an objective observer and create the risk of undermining the public's confidence in the judicial process. (**Liljeberg**, 100 L. Ed. 2d at 875).

This is particularly true where, as here, the father of the law clerk in question is not only a senior partner in the law firm representing the Company, but is also a former law clerk of Judge Lynne. The court of appeals correctly finds this to be an additional indicia of impropriety and lack of impartiality in the public mind.

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[9] The court of appeals noted that "Judge Lynne's practice of giving credit to his law clerk in a footnote may erroneously lead some to believe that the law clerk decided the case." (App. A, p. 23).

(App. A, p. 23).

Third, the court of appeals held that the public confidence in the judicial process would not be undermined by its holding that the 455(a) violation was harmless error:

> "Since we have determined that in fact a violation occurred and strongly urge Judge Lynne to discontinue his practice of **crediting** the work of his law clerks, we believe that our decision will instill greater confidence in our judiciary. To the extent that public confidence has already been undermined we do not believe that granting relief in this case will change the public's perception in any appreciable way." (Emphasis supplied)(App. A, p. 28).

Surely, this was written tongue-in-cheek. The emphasized portion of this statement urges Judge Lynne only to stop "crediting" the work of his law clerks, not to stop the law clerks from performing the work. How can such a direction as that restore public confidence? Moreover, there is no reason to the statement that if Judge Lynne has already undermined public confidence by what he has done, that confidence cannot be repaired by reversing this case and assigning it to another judge.

This case involves a putative class of 600 employees, all living in one community. These employees, plus the concerned members of their families, make up a very substantial number of people whose rights were **admittedly** adjudicated by a federal

judge in violation of 455(a). Does this Court believe that objective members of the community would not have reasonable cause to question the impartiality of such courts?

This Court said in **Liljeberg**, "The problem, however, is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges." (100 L. Ed. 2d at 875). What is the purpose of Section 455(a)? "The very purpose of Section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." (Id.) Applying this standard, it is beyond doubt that this case must be reversed and reassigned to another Judge. [10]

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[10] It is true that in **Liljeberg** this Court stated that "there need not be a draconian remedy for every violation of Section 455(a)." (100 L. Ed. 2d at 873-874). Moreover, this court stated that "there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance." (Id.) The court of appeals relies heavily on these statements, neither of which have any application to the instant case. This Court was speaking in the context of a judge who did not know of a circumstance that disqualified him. The court of apeals is disingenuous when it says, "In **Liljeberg** the Supreme Court made it clear that harmless error analysis would be appropriate for a [Section] 455(a) violation." (App. A, p. 29). The harmless error analysis referred to in **Liljeberg** had to do with a situation in which the judge did not know of a disqualification and could not therefore be influenced by it in making the decision. But, even this type of error may not be harmless. This Court said: "it would be equally wrong, however, to adopt an absolute prohibition against any relief in cases involving forgetful judges." (100 L. Ed. 2d at 874). The "harmless error" rationale the court of appeals attempts to extrapolate from **Liljeberg** is unsupportable.

DISQUALIFICATION UNDER 28 USC 455(b)(5) IS AUTOMATIC AND UNCONDITIONAL: THE HARMLESS ERROR RULE HAS NO APPLICATION IN SUCH CASES

Unlike most recusal cases, the law clerk in this case knew something of great importance that the judge knew only second hand through the law clerk-what the parties stated their legal positions to be at a hearing held by the law clerk at the judge's direction, but in the judge's absence. The law clerk became the judge!

Section 455(b)(5)(iii) automatically disqualifies a judge whose father is a member of a law firm in the case. Since the law clerk in this case acted as the alter ego of the judge in at least one hearing, as well as in analyzing "massive discovery materials" and "formulating" the summary judgment opinion, the same rule should apply to the court under these circumstances.

In **Hall v. Small Business Administration**, 695 F. 2d 175 (5th Cir. 1983) the Fifth Circuit held that a magistrate's disqualification was required under 28 USC Section 455 where the magistrate's law clerk had been a member of the plaintiff class and had agreed to be employed in the future by counsel representing the plaintiff in a proceeding before the magistrate:

> "Law clerks are not merely the judge's errand runners. They are sounding boards for tentative

> opinions and legal researchers who seek the authorities that affect decision. Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be. **Fredonia Broadcasting Corp.**, 569 F.2d at 256. **We agree with the Sixth Circuit that the clerk is forbidden to do all that is prohibited to the judge. See Price Brothers Co. v. Philadelphia Gear Corp.**, 629 F.2d 444, 447 (6th Cir. 1980), ***cert. denied,*** 454 U.S. 1099, 102 S.Ct. 674, 70 L.Ed.2d 641 (1981)." (Emphasis supplied)(695 F. 2d at 179)

In **SCA Services, Inc. v. Morgan,** 557 F. 2d 110 (7th Cir. 1977), Judge Morgan was assigned to a case in which his brother's law firm represented one of the parties. The other party to the action moved for the disqualification of Judge Morgan. The Seventh Circuit held that under the well settled principles of agency and partnership, even if the judge's brother did not actively participate in the case, the appearance of his law firm was in law an appearance of **every** lawyer in the firm. [11]

In **Potashnick v. Port City Construction Company**, 609 F. 2d 1101 (5th Cir. 1980), [12] Judge Hand was reversed for failure to

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[11] The Seventh Circuit also found that even if the outcome of the case made absolutely no financial difference to the law firm, its reputation and good will could be affected by a favorable versus an unfavorable decision, citing the Congressional drafts of the amendments to Section 455 which recognized that non-economic interests may affect a judge's bias or prejudice. The court concluded that the provisions of 455(b) are mandatory and require recusal where applicable **regardless of other circumstances.** (577 F. 2d at 116-117)

[12] This case is binding on the Eleventh Circuit under the doctrine of **Bonner v. City of Prichard**, 661 F. 2d 1206 (11th Cir. 1981).

recuse himself under 28 USC Section 455(b)(5)(iii) when one of the parties was represented by a law firm in which his father was a senior partner. Recusal was required even though the motion was not made until the end of a lengthy trial and counsel for all parties had known of the relationship since the case was filed. The court held that the 455(b)(5)(iii) disability could not be waived and required, regardless of other considerations, that the judge be recused.

A judge who is related in the third degree to any attorney representing a party before that judge is **automatically** disqualified. In **McCuin v. Texas Power & Light Company**, 714 F. 2d 1255 (5th Cir. 1983), the court discussed the congressional intent in adopting 28 USC 455(b)(5):

> Before Congress amended the judicial disqualification statute in 1974, a judge's kinship to a lawyer appearing before him did not automatically require the judge's recusal. The statute provided simply that the judge was to disqualify himself if the relationship would "render it improper, in his opinion, for him to sit. . . ." In a report recommending a change in the statute, a House of Representatives Committee criticized this standard because it "made the judge himself the sole decider of . . . the relationships which would be improper and lead to disqualification." Congress, therefore, amended the statute to **mandate** the judge's disqualification in cases in which a person related within the third degree to the

> judge or the judge's spouse is acting as a lawyer or has a substantial interest in the outcome of the proceedings.
> The legislative history of the amendment of Section 455 indicates that Congress' purpose was to adopt a categorical rule that would be self-enforcing. In Potashnick, we noted that Section 455 makes it the judge's duty to disqualify himself as soon as he is aware that the grounds exist. The mandate is made inexorable by an express prohibition against waiver. (Emphasis supplied)(714 F. 2d at 1259)

The Fifth Circuit correctly cites the case of **United States v. Conforte**, 624 F. 2d 869, 880 (9th Cir. 1980) for the proposition that 455(b)(5) imposes a self-enforcing duty on the judge to disqualify himself and that the disability cannot be waived.[13]

The Eleventh Circuit in the instant case states a different rule in 455(b) cases than the congress and the other courts of

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[13] The Judicial Conference disapproved the non-waiver provisions of 455(b) and argued that there should be a provision for waiver where that "may in a particular case be advantageous to the litigants and in the best interests of the administration of justice." **Report of the Joint Committee on the Code of Judicial Conduct**, 1974 U.S. Code Cong. & Admin. News 6351, 6361.

> The congressional drafters rejected this approach and stated: "... a kinship within the third degree cannot be waived under the provisions of this bill. While the ABA canon on disqualification would permit waiver in th[is] instance [ ], the committee believes that confidence in the impartiality of federal judges is enhanced by a more strict treatment of waiver. There are approximately 667 federal judges, active and retired. The statutes contain ample authority for chief judges to assign other judges to replace ... a ... judge who becomes disqualified." H. R. Rep. No. 1453, 93d Cong., 1st Sess. (973), reprinted in 1974 U.S. Code Cong. & Admin. News 6351, 6352.

appeal-to have the need for recusal in summary judgment cases turn on the merits of the judge's decision. This gives the disqualified district judge the option of recusing himself under 455(b) or staying in the case because he believes it can be disposed of on summary judgment. If the court of appeals agrees with summary judgment, the public sees a judge deciding a case in favor of his relative without a trial. If the court of appeals disagrees, the case is reversed on the merits.

Moreover, the decision on a summary judgment generally cannot be made until extensive discovery has been undertaken. This means that the lawyer will be appearing before his judicial relative for rulings on the plethora of decisions a judge makes during discovery.

SUMMARY JUDGMENT WAS IMPROPER BECAUSE THE PLAINTIFFS' FRAUD CLAIMS ARE NOT PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT

The court of appeals ruled the state law fraud claims were preempted citing **San Diego Building Trades Council v. Garmon,** 59 U.S. 263 3 L. Ed. 2d 775 779 S. Ct. 773 (1959) **Garmon** held that, "When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice

under Section 8, due regard for the federal enactment requires that state jurisdiction must yield." (359 U.S. at 244, 3 L. Ed. 2d at 782) **Garmon** recognized exceptions. One is, "... where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." (359 U.S. at 244, 3 L. Ed. 2d at 782) This Court in **Belknap, Inc. v. Hale**, 463 U.S. 491, 103 St. Ct. 3172, 77 L. Ed. 2d 798 (1983) recognized state law claims of fraud and breach of contract as an exception.

The court of appeals adopted **Serrano v. Jones & Laughlin Steel Company**, 790 F. 2d 1279 (6th Cir. 1986), to distinguish **Belknap**. **Serrano** has no application.[14]

The failure of the Union to fairly represent the employees in the instant case meant that the employees were without any representation. The state certainly has a **Garmon** exception interest in

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[14] The misrepresentations in **Serrano** were that the employer had promised persons brought in to replace striking workers that they would not be fired if a settlement with the union was reached and the strikers returned to work. The union made replacement of the "strike breakers" a condition of settlement and the employer capitulated. The "strike breakers" were the plaintiffs. **Serrano** was not a suit jointly against the union and the employer and did not involve claims by the plaintiffs that the union had failed in its duty to represent. The company brought the union into the case as a third party defendant. There was no claim in **Serrano** that the representation process under the NLRA had failed. The alleged "misrepresentations" were actually a breach of contract claim.

seeing that a large group of its citizens who have been defrauded of very substantial salary and benefits have some remedy. This Court made that clear in **Linn v. United Plant Guard Workers**, 383 U.S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582 (1966).[15]

SUMMARY JUDGEMENT WAS IMPROPER UNDER SECTION 301 AND 28 USC SECTION 1337

The Ninth Circuit, in **ACRI v. International Ass'n. of Machinists**, 781 F. 2d 1393 (9th Cir. 1986) held that "[a] union's duty of fair representation extends to conduct during the negotiation or administration of collective bargaining agreements." (781 F. 2d at 1397)[16] In **Vaca v. Sipes**, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967), this Court held that unfair representation claims against unions are not preempted by the NLRA. If the unfair representation claims against the unions are not preempted, then claims against the employer should not be preempted. Thus a hybrid Section 301 duty of fair representation claim is stated against the Union for failure of fair representation and against the Company under Section 301.

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[15] This Court held that the inability of the NLRB to grant effective relief "aggravates the State's concern since the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim take matters into his own hands." (383 U.S. at 64, n. 6)

[16] Citing **Retana v. Apartment, Motel, Hotel & Elevator Operators' Union, Local No. 14**, 453 F.2d 1018, 1023-24 (9th Cir. 1972).

The plaintiffs also state a claim under **DelCostello v. Teamsters**, 462 U.S. 151, 103 S. Ct. 2281, 76 L. Ed. 2d 476, (1983), that the Company breached the employment contract and that the Union breached its duty of fair representation. (462 U.S. at 165.) Such a claim is independent of hybrid Section 301/breach of duty of fair representation claims. See, e.g., **Berialt v. Local 40, Super Cargos & Checkers of I.L, & W.U.**, 501 F. 2d 258, 264 (9th Cir. 1974); **Retana v. Apartment, Motel, Hotel & Elevator Operators' Union**, 453 F. 2d 1018, 1021-1022 (9th Cir. 1972).

Claims for breach of the duty of fair representation in the negotiation and ratification of the concessions in the instant case are also not preempted by the NLRA. This issue was dealt with directly in **Berialt v. Local 40, Super Cargos & Checkers of I.L. & W.U., supra**, where the court held that **Amalgamated Association of Street Employees v. Lockridge**, 403 U.S. 274, 91 S. Ct. 1909, 29 L. Ed. 2d 473 (1971), established that claims for breach of duty of fair representation in negotiating contract agreements brought under 28 USC Section 1337 were not preempted by the NLRA, just as hybrid Section 301/duty of fair representation claims are not preempted. **Vaca v. Sipes, supra.**

SUMMARY JUDGMENT WAS IMPROPER UNDER THE PLAINTIFFS' CLAIMS OF BREACH OF THE DUTY OF FAIR REPRESENTATION IN THE NEGOTIATION PROCESS

The plaintiffs allege that the Union breached its duty of fair representation in negotiating the two concession agreements. **Berialt v. Local 40, Super Cargos & Checkers of I.L. & W.V., supra**, recognized that a union's duty to fairly represent the interests of its members and to fulfill its fiduciary duty extends to the negotiation process. Moreover, since breach of the duty of fair representation in negotiating the contract necessarily infects the terms of the contract, the failure to exhaust the grievance procedure does not bar a federal court action. A union has a duty to investigate the claims of an employee against an employer in the grievance procedure context. **Turner v. Airtransport Dispatcher's Association**, 468 F. 2d 297 (5th Cir. 1972); **Freeman v. O'Neal Steel, Inc.**, 409 F. 2d 1123 (5th Cir. 1980). This duty to investigate must be imposed on the Union in the negotiation process as well. There is substantial evidence in this case the Union intentionally or recklessly failed in that duty.

SUMMARY JUDGMENT WAS IMPROPER UNDER THE PLAINTIFFS' CLAIMS OF BREACH OF THE DUTY OF FAIR REPRESENTATION IN THE RATIFICATION PROCESS

The plaintiffs' claims of breach of duty of fair representation is clearly supported in this case by substantial evidence because the Union representatives made intentional or reckless misrepresentations to the employees during the concession ratification process. **Anderson v. United Paperworkers International Union,** 641 F. 2d 574, 574-578 (8th Cir. 1981); **Deboles v. Transworld Airlines**, 552 F. 2d 1005, 1018 (3rd Cir.), cert. denied 434 U.S. 837, 98 S, Ct. 126, 54 L. Ed. 2d 98 (1977).

At least three of the federal circuit courts of appeal have recognized a union's duty not to misrepresent the union's bargaining efforts and position in order to induce ratification of a newly negotiated collective bargaining agreement. See, **Anderson v. United Paperworkers International Union**, 641 F. 2d 574, 577 (8th Cir. 1981); **Deboles v. Transworld Airlines, Inc.**, 552 F. 2d 1005, 1018-20 (3rd Cir. 1977), **cert. denied**, 434 U.S. 837, 98 S. Ct.126, 54 L. Ed. 2d 98 (1977); **Retana v. Motel, Hotel & Elevator Operators' Union, Local No. 14**, 453 F. 2d 1018, 1023-24 (9th Cir. 1972).

In **Deboles, supra**, the Third Circuit reiterated the requirement that the union "adhere to the fiduciary standards inherent in

its position as bargaining agent." **Deboles**, 551 F. 2d at 1019 (citing, **Brady v. Transworld Airlines, Inc.**, 401 F. 2d 87, 94 (3rd Cir. 1968), cert denied, 392 U.S. 1048, 89 S. Ct. 680, 21 L. Ed. 2d 691 (1969). **Deboles** clearly states that the union has a fiduciary duty to fairly represent the terms of a proposed contract agreement to members during the ratification process.

CONCLUSION

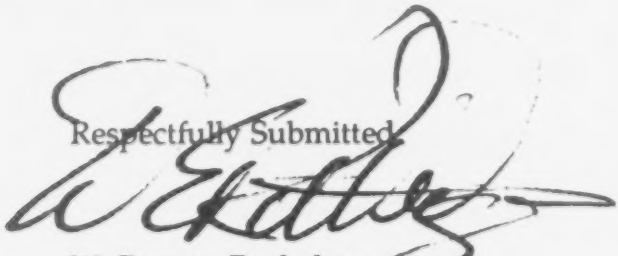
The court of appeals opinion is based on a misunderstanding of the reasons for the recusal rules of 28 USC 455(a). In **Liljeberg** this Court made it clear that the decisive factor in deciding such cases is "to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." (100 L.Ed 2d at 875). The court of appeals attempts to supplant this test with an evaluation of the merits of the decision made by the disqualified judge to determine whether the substantive result would be changed by reversing and assigning the case to another judge. These two tests are incompatible and the **Liljeberg** test must prevail unless this Court is prepared to disregard the legislative mandate embodied in 455(a).

The ruling of the court of appeals as to 455(b)(5)(iii) is simply wrong. The court of appeals did not decide whether

455(b)(5)(iii) applied, merely holding that in any event the harmless error rule would make the question moot in this case. This is simply to disregard the legislative history of the statute and all the cases decided under it. The court of appeals seems to want a return to the old duty to sit rule and the discretionary recusal rules. The amendments to 455 make that impossible.

Moreover, the court of appeals is wrong in affirming the summary judgment awarded by the disqualified judge. There are serious legal errors as well as factual ones in the opinion. The limitations of space in this Petition for Certiorari make it impossible to include an analysis of more than a fraction of the evidence gathered in the "massive discovery" conducted in this case. **No appellate court can ever review the discovery in a complex case such as this to the same degree as can the district judge and that is just another reason why that all-important task cannot be assigned to a law clerk whose father is one of the lawyers in the case!**

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that I have mailed a copy of the foregoing to all counsel of record on this the 14th day of March, 1989.

Of Counsel

APPENDIX A

Calvin L. PARKER; Gene A. Childers; Maple L. Copeland; Will Goodman; Nathaniel Grant; Thomas Ray Loveless; Ruben I. Pierce; Joe D. Pressley; Virgil Lee Weatherspoon, on their own behalf and on behalf of all other hourly wage employees of Connors Steel Company similarly situated, and as representatives of a class of persons consisting of those employees who on or after June 1, 1982, were employed as hourly wage earners by Connors Steel Company and represented by the United Steelworkers of America, AFL-CIO and its Local Union No. 2250, Plaintiffs-Appellants.

v.

CONNORS STEEL COMPANY; H. K. Porter Company, Inc.; and United Steelworkers of America, AFL0-CIO, CLC, Defendants-Appellees,

Carl L. Statum; Tom Kimbrell; and James E. Norman, Defendants.

No. 87-7607.

United States Court of Appeals,
Eleventh Circuit.

Sept. 29, 1988.

Appeal for the United States District Court for the Northern District of Alabama.

Before HATCHET and COX, Circuit Judges, and FLOYD R. GIBSON*, Senior Circuit Judge.

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*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by the designation.

FLOYD R. GIBSON, Senior Circuit Judge:

Appellants, former employees of Connors Steel Company (Connors) and putative class representatives of approximately 600 former Connors employees, appeal an order of the district court granting summary judgment to Connors, (H.K. Porter), and United Steelworkers of America, AFL-CIO, CLC (Union), in this complicated dispute which followed the closing of Connors' steel plant in Birmingham, Alabama. The employees sued Connors, its parent corporation H.K. Porter (Connors and H.K. Porter are collectively referred to as the "Company"), and the Union alleging fraud, a hybrid Section 301 / fair representation claim, breach of the duty of fair representation, and breach of a collective bargaining agreement (CBA or agreement) and two concession agreements.

The district court concluded that the state law fraud claims were preempted by sections 7 and 8 of the National Labor Relations Act (NLRA or Labor Act). The district court also determined that there were no genuine issues of material fact and that the Union was entitled to summary judgment on the fair representation claim by the former employees as a matter of law. Finding that the Company's liability under section 301 of the Labor Management Relations Act (LMRA) was conditional on the Union's breaching its duty of fair representation, the district court granted the Company's motion for summary judgment. We affirm.

BACKGROUND

This case arose out of two concession agreements given by the employees to the Company which provided for an emergency reduction in wages and benefits. The first concession agreement became effective on September 1, 1982 and reduced wages by twenty percent, reduced certain benefits, and provided for complete repayment of all wage and benefit concessions if Connors returned to profitability. Connors required the concessions to keep its Birmingham[1] plant open because it was facing vigorous

[1]During the negotiation of the first concession agreement Connors also operated a steel plant in Huntington, West Virginia, but this facility was closed on July 1, 1982.

competition in the reinforcing steel bar market from "mini-mills" and had incurred $1,595,000 in losses during the first five months of 1982.

Connors believed that given its staggering losses H.K. Porter would close the Birmingham plant if the workers did not approve the concessions. The Union met with Connors' representatives and based on its review of Connors' financial records it decided to recommend the concession package to its membership. The Union membership subsequently approved the concession agreement.

Losses at Connors continued to mount despite the implementation of the concession agreement and the relief it provided. By the end of 1982 Connors' yearly losses exceeded $9,000,000.

In January 1983 negotiations began on a second concession agreement which was ratified by the union membership[2] and went into effect on February 27, 1983. The concessions included a reduction of hourly wages by twenty percent, elimination of supplemental unemployment contributions, savings and vacation benefits, Sunday premiums, shift differentials, and vision and dental benefits. The second package of concessions seemed to reverse the trend of mounting losses. In February 1983 Connors lost $1,010,000 and this monthly loss declined in the following months to $90,000 by August 1983.

The CBA, as modified by the two concession agreements, was set to expire on September 1, 1983, so Connors began negotiating with the Union on a new agreement to become effective upon the expiration of the prior agreement. Connors' final proposal for a new agreement was rejected by the union membership on August 8, 1983. The following day Connors gave the Union notice that the plant would close on September 1. Connors and the Union agreed that, pursuant to the grievance and arbitration provisions of the CBA, all differences between the parties with respect to

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[2]The Union also urged its members to accept the second concession package.

payment of benefits upon plant closure would be resolved through arbitration.

In October 1983 a group of former Connors employees met to discuss the benefits that Connors proposed to pay them as a result of the plant closure. Seven grievances were prepared complaining that: vacation pay had not been fully paid; all employees at closing were entitled to layoff status and the benefits resulting therefrom; and the employees should be paid the value of the benefits given up in the concession agreements. Connors and the Union agreed to present these grievances to an arbitrator for resolution along with the other issues that they had already agreed to arbitrate.

Prior to the arbitration hearing the employees filed two unfair labor practice charges with the National Labor Relations Board (NLRB or Board). The employees alleged that Connors had bargained in bad faith in violation of section 8(a)(5) of the NLRA and that the Union violated its duty of fair representation under section 8(b) of the Act. Shortly after the charges were filed the Board informed the employees that the charges had been investigated but further proceedings were not warranted because the charges were not filed within section 10(b)'s six month limitations period. The employees appealed the dismissal of the charges to the NLRB General Counsel, but the appeal was denied.

The employees then filed this lawsuit in Alabama state court alleging: 1) various breaches of the Union's duty of fair representation; 2) a breach of the CBA and concession agreements by Connors; and 3) fraud and bad faith against the Company in negotiating and inducing the employees to ratify the two concession agreements. The case was then removed to federal court.

After the case was removed the arbitration hearing took place. The arbitrator issued a forty-three page decision finding in favor of the Union on two of the grievances. Connors then complied with the arbitrator's award by issuing checks to 586 former employees totaling $243,392.66.

Thereafter, the district court granted Connors, H.K. Porter,

and the Union summary judgment. The court concluded that the employees' state law fraud claims were preempted by sections 7 and 8 of the NLRA. The court dismissed the fair representation claims against the Union finding that "[n]either ineffectiveness nor ineptitude gives rise to a claim for breach of this duty." Finally, the district court granted summary judgment to Connors and H.K. Porter because their liability for breach of the CBA under Section 301 was conditional on a finding that the Union breached its duty of fair representation.

DISCUSSION

This case is unique because the employees are seeking redress for claims that have already been the subject of an arbitration proceeding and presented to the NLRB as unfair labor practices. Because the employees received only a partial award in the arbitration proceeding and because the NLRB dismissed their unfair labor charges, the employees turned to state court to pursue relief based primarily on state tort theories. The case was removed and decided on the Company and Union's motions for summary judgment. Now on appeal we are faced with the following questions: 1) the significance of the arbitration award on the claims raised by the employee; 2) the significance of the NLRB's dismissal of the unfair labor practicescharges filed by the employees; 3) whether the employees claims are preempted by Sections 7 and 8 of the NLRB or section 301 of the LMRA; and finally, we must determine whether the district court was correct when it granted summary judgment dismissing the employees; claims of breach of the duty of fair representation by the Union and Breach of the CBA by the Company. [3]

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[3]This type of claim is often referred to as a "hybrid" section 301 suit. **See Hester v. Intern. Union of Operating Engineers,** 830 F. 2d 172, 175 (11th Cir. 1987)(per curiam)("Most duty of fair representations are arise in the context of what are known as "hybrid" suits. Hybrid suits involve claims by an employee against both the employer and the union.")(panel opinion on denial of petition for rehearing of 818 F. 2d 1537), petition for cert. filed, 56 U.S.L.W. 3627 (March 15, 1988).

A. State Law Fraud Claims

The crux of the employees' state law fraud claims is that the Company fraudulently obtained the 1982 and 1983 concession agreements by representing that it would keep the Birmingham steel plant open if the employees granted the concessions. The employees also allege that the Company intended to close the plant from the very beginning and obtained the concessions in order to reduce the costs associated with the plant closing.

[1] The district court concluded that the claims were nothing more than allegations that the Company failed to bargain in good faith and thus the claims were arguable within the exclusive jurisdiction of the NRLB.[4] Therefore, the district court concluded that the claims were preempted by sections 7 and 8 of the Labor Act citing **San Diego Building Trades Council v. Garmon,** 359 U.S, 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959). In *Garmon* the Supreme Court stated:

> When an activity is arguably subject to Section 7 or Section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

Id. at 245, 79 S. Ct. at 779.

[2] Thus, the employees' state fraud claims are preempted if they touch upon an activity that is arguably protected or prohibited by the Labor Act.

In **Serrano v. Jones & Laughlin Steel Co.**, 790 F. 2d 1279 (6th Cir. 1986), the Sixth Circuit was faced with a similar situation.

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[4]It is clear that to the extent the employees' state law claims require the interpretation of the CBA the claims would be preempted by Section 301 of the LMRA. **Lingle v. Norge Division of Magic Chef, Inc.,** ._____ U.S. _____, 108 S. Ct. 1877, 1885, 100 L. Ed. 2d 410 (1988).

In that case Jones & Laughlin Steel Co. (J & L), also confronted with the recession in the steel industry, negotiated a concession agreement allowing it to depart from the basic collective bargaining agreement. The concession agreement, which was signed in July, 1981, was entered in an effort to avoid a shutdown of one of J & L's coke plants. Nevertheless, the plant was closed and the Union filed a grievance which was not pursued through the various steps provided in the CBA. After the Union terminated the grievance without pursuing arbitration, the employees filed an action in Ohio state court which was then removed to federal court. The employees raised state law fraud claims similar to those raised by the employees in the instant case. They alleged that despite J & L's representations that it intended to rebuild its coke facilities if certain concessions were made by the J & L employees, it actually intended to rebuild the facilities only if it could obtain an extension of time within which to comply with Clean Air Act requirements.

The court in **Serrano** was presented the same arguments that have been presented in the instant case. The employees argued that the fraud claims were not preempted because the controversy presented under state law was not identical to that which could have been presented to the NLRB. Furthermore, the claims come within an exception to the preemption doctrine as claims that touch interests so deeply rooted in local feeling and responsibility that no congressional intent to preempt can be inferred.

The **Serrano** court first concluded that the **Garmon** preemption doctrine applied because the state fraud claims touched upon activity which was arguably prohibited by the Labor Act. Specifically, the Sixth Circuit determined that if the employees' allegations were true, J & L's conduct would be prohibited by Section 8(d) of the Labor Act which requires an employer to bargain in good faith "with respect to wages, hours and other terms and conditions of employment . . ." 29 U.S.C. Section 158(d).

> No matter how it is stated, the gravamen of the three fraud charges is that J & L did not bargain in good faith in obtaining concessions from the

> Union in the July agreement. To the extent that plaintiffs claim fraud unrelated to the July agreement, the same principles apply. . . . [W]hether classified as a violation of the general duty to bargain in good faith or the more particular duty to bargain over the effects of a plant closure, the conduct about which plaintiffs are complaining was arguably a violation of Section 8.

Serrano, 790 F. 2d at 1286-87.

The same principles and analysis apply to the instant case. The displaced Connors' employees raise claims that are in substance allegations that the Company breached its duty to bargain in good faith in negotiating the concessions and in failure to reveal the likelihood of a plant closure despite the concessions. These are the types of claims to which the **Garmon** preemption doctrine was intended to apply.

In **Sears, Roebuck & Co. v. San Diego County District Council of Carpenters**, 436 U.S. 180, 197, 98 S. Ct. 1745, 1757, 56 L. Ed. 2d 209 (1978), the Supreme Court stated that:

> The critical injury [in the **Garmon** analysis] is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the State court is identical to (as in **Gardner**) or different from (as in **Farmer**) that which could have been but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the **Garmon** doctrine was designed to avoid.

Further, we note that the Garmon preemption doctrine was premised, in part, on what the Supreme Court has termed notions of "primary jurisdiction," **Id.** at 199, 98 S. Ct. at 1758

"'[P]rimary jurisdiction' is used to refer to the various considerations articulated in Garmon and its progeny that militate in favor of pre-empting state-court jurisdiction over activity which is subject to the unfair labor practice jurisdiction of the federal Board." **Id.** at n. 29, 98 S. Ct. at 1758 n. 29. The Court explained that the primary jurisdiction rationale justifies preemption only in situations in which an aggrieved party has a reasonable opportunity either to invoke the Board's jurisdiction himself or to induce his adversary to do so. "The primary-jurisdiction rationale unquestionably requires that when the same controversy may be presented to the state court or the NLRB, it must be presented to the Board." **Id.** at 202, 98 S. Ct. at 1760.

[3] We believe that the Supreme Court's primary jurisdiction rationale also requires preempting the employees' state law fraud claims. The employees filed two unfair labor practice charges with the NLRB which were later dismissed[5] and an appeal denied by the General Counsel. Consequently, the employees, through artful drafting, have recast the same claims and factual allegations to state law fraud claims. We believe that the primary jurisdiction rationale has the greatest validity when a party has sought redress for his claims from the NLRB and in the face of an adverse decision the claims are restructured as state law claims and pursued in state court. **Cf. Communications Workers v. Beck,** ____ U.S. ____, 108 S. Ct. 2641, 2646-2648, 101 L. Ed. 2d 634 (1988)("Employees, of course, may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation."). By initially pursuing relief with the NLRB the employees have implicitly recognized the Board's jurisdiction over their claims.

Further, we do not believe that the employees' claims bring this case within any of the recognized exceptions to the Garmon preemption doctrine.

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[5] The NLRB dismissed the charges because they were not filed within the applicable statute of limitations.

In **Garmon** the Supreme Court recognized several exceptions to preemption. Relevant in this appeal are the exceptions for cases involving compelling state or local interests and cases where the issues involved are of peripheral concern to the purposes of the Labor Act. The employees argue that both exceptions apply to this case.

The first exception applies "where the regulated conduct touche[s] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we [can] not infer that Congress ha[s] deprived the States of the power to act." **Garmon**, 359 U.S. at 244, 79 S. Ct. at 779 (footnote omitted); **Amalgamated Association of Street, Electric Railway & Motor Coach Employees of America v. Lockridge**, 403 U.S. 274, 297, 91 S. Ct. 1909, 1923, 29 L. Ed. 2d 473 (1971)[hereinafter Motor Coach Employees].

[4,5] When the activity in question is traditionally subject to state regulation, then the Court has utilized a flexible approach giving due consideration to state's interests. **Sears, Roebuck & Co.**, 436 U.S. at 187-88, 98 S. Ct. at 1752-1753. Consistent with this decision we have balanced Alabama's interest in protecting its citizens from the challenged conduct against the risk of interference with the regulatory jurisdiction of the NLRB. In cases where, as here, the substance of the dispute is the same under both state and federal law, the state law must yield to the jurisdiction of the NLRB. **Cf. Lumber Production Industrial Workers Local #1054 v. West Coast Industrial Relations Assoc. Inc.**, 775 F. 2d 1042, 1048 (9th Cir. 1985) ("[I]f a crucial element of a state court action is identical to an element of an unfair labor practice that is arguably covered by the NLRA, then the state action is preempted."). We believe that allowing state law fraud claims for conduct that would also be a violation of the employer's duty to bargain in good faith would necessarily undermine the Board's exclusive jurisdiction and may subject the employer to conflicting substantive rules. **See Local 926, International Union of Operating Engineers v. Jones**, 460 U.S. 669, 676, 103 S. Ct. 1453, 1458-1459, 75 L. Ed. 2d 368 (1983)[hereinafter **Operating Engineers**]; **Motor Coach Employees**, 403 U.S. at 292, 91 S. Ct. at 1920-1921 ("Pre-emption . . . is designed to shield the system from conflicting regulation of con-

duct."). Further, the state's interest in protecting its citizens from fraud and misrepresentations does not outweigh our concern in protecting the NLRB's jurisdiction from erosion through state regulation. **Serrano,** 790 F. 2d at 1287-88. Thus, the balancing of local interests against the regulatory scheme established by Congress compels preemption.

The employees argue that the Supreme Court's decision in **Belknap, Inc. v. Hale,** 463 U.S. 491, 510, 103 S. Ct. 3172, 3183, 77 L. Ed. 2d 798 (1983)(dealing with rights of discharged replacement employees) removes their state law claims of fraudulent misrepresentation and breach of contract from **Garmon** preemption. We disagree. The Sixth Circuit rejected this same argument in **Serrano** noting that **Belknap** was distinguishable because the dispute presented to the state court was not identical to the dispute which could have been presented to the Board . In the instant case, however, the substance of the employees' labor charge and their state fraud claims are identical. The facts and allegations of both claims are also identical. In such circumstances it would not be proper to allow the employees to escape the **Garmon** preemption doctrine through artful drafting. **Motor Coach Employees,** 403 U.S. at 292, 91 S. Ct. at 1920-1921 ("It is the conduct being regulated, not the formal description of governing legal standards, that is the proper focus of concern.").

The second exception argued by the employees allows states to regulate conduct that is only of peripheral concern to the Labor Act. **Operating Engineers,** 460 U.S. at 676, 103 S. Ct. at 1458-1459. This exception, however, has no applicability to the instant case.

As noted in **Serrano,** "[f]ailure of an employer to bargain in good faith about terms and conditions of employment is not peripheral to the concerns of federal labor law; rather, it strikes at the heart of one of the basic concerns of that law." 790 F. 2d at 1287. Good faith bargaining is a core concern of the Labor Act, not a matter of only peripheral concern. Eroding the Board's jurisdiction over claims involving a failure to bargain in good faith will inevitably eviscerate the Labor Act and all that it has accomplished. Consequently we do not believe that the employees'

claims fit into any recognized exception to the **Garmon** preemption doctrine.

B. Fair Representation and Breach of Contract Claim

The employees appear to be raising several claims involving the conduct between the Union and the Company. The claims appear to be as follows: 1) a hybrid Section 301/fair representation claim against the Union and the Company; 2) a separate claim against the Union for breach of the duty of fair representation in the ratification of the concession agreements and in the Union's handling of their grievances; and 3) a separate claim against the Company for breach of the CBA and the concession agreements. We believe that the first two claims fail because the evidence does not establish a breach of the duty of fair representation by the Union and because the employees have failed to establish a genuine issue of material fact that would preclude summary judgment.

In **DelCostello v. International Brotherhood of Teamsters,** 462 U.S. 151, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983), the Supreme Court discussed the nature of a hybrid Section 301/fair representation claim as follows:

> Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests in Section 301, since the employee rests in Section 301, since the employee is alleging a breach of the collective-bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. "Yet the two claims are inextricably interdependent. "To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union.'" . . . The employee may, if he chooses, sue

> one defendant and not the other; but the case he must prove is the same whether he sues one, the other or both. The suit is thus not a straightforward breach-of-contract suit under Section 301, . . . but a hybrid Section 301/fair representation claim, amounting to "a direct challenge to 'the private settlement of disputes under [the collective-bargaining agreement].'"

Id. at 164-65, 103 S. Ct. at 2290-2291 (citations omitted).

The district court determined that the evidence did not support the employees' claim that the Union breached its duty of fair representation and thus their hybrid Section 301/fair representation claim failed as a matter of law.

[6] The district court granted the Union and the Company summary judgment concluding that the Company's liability under this claim was conditioned on a finding that the Union breached its duty of fair representation. We agree with the district court's analysis. The above quote from **DelCostello** makes it clear that the claims against the Union and the Company are interdependent and in order to prevail the employee must satisfy his burden of proving a breach of contract by the Company and a breach of the Union's duty of fair representation.

[7] The employees claim that the Union breached its duty of fair representation in the negotiation of the two concession agreements. As we shall discuss further below, this claim fails because mere negligence in negotiations does not amount to a breach of the union's duty.

In **International Brotherhood of Electrical Workers v. Foust**, 442 U.S. 42, 99 S. Ct. 2121, 60 L. Ed. 2d 698 (1979), the Supreme Court broadly characterized the duty of fair representation: "Under the doctrine, a union must represent fairly the interests of all bargaining-unit members during the negotiation, administration, and enforcement of collective-bargaining agreements." **Id.** at 47, 99 S. Ct. at 2125 (emphasis added). **See also Communications Workers v. Beck**, _____ U.S. _____, 108 S. Ct. at 2646-2648 ("This

jurisdiction to adjudicate fair representation claims encompasses challenges leveled not only at a union's contract administration and enforcement efforts, . . . but as its negotiation activities as well.") (citations omitted).

[8] The employees allege that the Union breached its duty of fair representation in the negotiation of the concession agreements, in processing their grievances, and in obtaining ratification of the concession agreements. The nature of the duty of fair representation which a Union owes its members is determined by considering the context in which the duty is asserted. Thus, the duty of fair representation in the context of negotiations may be determined by a different standard than is the duty owed in the processing of grievances or ratification of the concession agreements. **2 The Developing Labor Law** 1321 (C. Morris 2d ed. 1983)[hereinafter **Labor Law**] (Neither the court nor the Board have "articulated clear distinctions defining the duty in relation to the particular aspect of union representation which is being challenged.").

[9] A violation of the Union's duty of fair representation in the context of negotiations with the Company is established if the Union's conduct in negotiations is arbitrary, irrational, or undertaken in bad faith. **See e.g., Hendricks v. Airline Pilots Ass'n Intern.**, 696 F. 2d 673, 678 (9th Cir. 1983). The Supreme Court discussed the Union's duty in the context of negotiations as follows:

> Any authority to negotiate derives its principal strength from a delegation to the negotiators of a discretion to make such concessions and accept such advantages as, in the light of all relevant considerations, they believe will best serve the interests of the parties represented. A major responsibility of negotiators is to weigh the relative advantages and disadvantages of differing proposals.
>
> . . . . . .

> The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.

Ford Motor Co. v. Huffman, 345 U.S. 330, 337-38, 73 S. Ct. 681, 685-686, 97 L. Ed. 1048 (1953).

[10,11] Applying these standards, we do not believe that the employees have sustained their burden of showing a breach of the Union's fair representation duties in the negotiation process. A union cannot ensure job security when economic conditions make it unprofitable to keep a plant operating. Likewise, a company is not required to keep a plant operating after a CBA has expired[6] and the company is not obligated to enter a new CBA[7]. The Union was faced with threats of plant closure by the Company if concessions were not given. Now, after ratifying these very concessions, the employees attempt to hold the Union accountable. We do not believe that under these circumstances the Union breached its duty of fair representation in its negotiation of the concession agreements, but, to the contrary, it appears that the Union officials did the best they could under difficult conditions, including imminent closure of the plan. *See Dwyer v. Climatrol Industries, Inc.*, 544 F.2d 307, 311 (7th Cir.1976) (union did not breach duty of fair representation in negotiating plant closedown agreement), *cert. denied*, 430 U.S. 932, 97 S.ct. 1553, 51 L.Ed.2d 776 (1977).

[12] In the context of grievance processing, in order to

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[6]The CBA in this case expired on September 1, 1983 and the plant ceased operations on the same day.

[7]A company's duty to bargain in good faith with the union does not require it to enter a CBA that it finds unacceptable. **See Lumber Production Industrial Workers Local #1054,** 775 F.2d at 1046 ("collective bargaining agreements expire according to their own terms and neither employers nor unions have any implied obligation to enter into a new agreement.")

establish that the union has breached its duty of fair representation the employee must show that the union's handling of the grievance was either arbitrary, discriminatory, or done in bad faith. ***Harris* v. Schwerman Trucking Co.**, 668 F.2d 1204, 1206 (11th Cir.1982); **see also Vaca v. Sipes**, 386 U.S. 171, 190, 87 S.Ct. 903, 916-917, 17 L.Ed.2d 842 (1967). An example would be when a union arbitrarily ignores a meritorious grievance or is perfunctory in its processing of the grievance. **Id.**

We note that a union is allowed considerable latitude in its representation of employees. The grievance and arbitration process is not conducted in a judicial forum and union representatives are not held to strict standards of trial advocacy... Cases are uniform in holding that neither negligence on the part of the union nor a mistake in judgment is sufficient to support a claim that the union acted in an arbitrary and perfunctory manner.

Harris, 668 F.2d at 1206 (citations omitted).

[13] In the present case the employees have failed to create a genuine factual dispute with respect to the grievance procedure and the Union's handling of their grievances. The employees' claim is without merit. It is ironic that the employees challenge the Union's processing of their grievances notwithstanding the fact that the Union pursued all of their grievances through arbitration and received an award on two of the grievances presented to the arbitrator.

[14,15] The employees argue that the Union's conduct in seeking ratification of the concession agreements also violated its duty of fair representation. **See, e.g. Bautista v. Pan American World World Airlines, Inc.**, 828 F.2d 546, 550 (9th Cir.1987) (duty of fair representation encompasses a Union's conduct in seeking employee ratification of CBA); **Anderson v. United Paperworkers International Union**, 641 F.2d 574, 578 (8th Cir.1981); ***De*Boles v. Trans World Airlines, Inc.**, 552 F.2d 1005, 1018 (3d Cir.), **cert. denied**, 434 U.S. 837, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977). While we agree that in an appropriate case a fair representation claim may be stated against a union for misrepresenting the terms of an agreement to its membership, we do not believe that in the present

case the Union has breached any duty it owes the employees it represents. In the letter urging ratification of the concession agreements the Union accurately reflected its negotiation efforts with the Company and the economic crisis in the steel industry. The employees have failed to show any misrepresentation made by the Union in obtaining ratification of the concession agreements.

Taking the facts in the light most favorable to the employees the Union's conduct in this case was negligent at most. **Rollins v. Techsouth, Inc.** 833 F. 2d 1525, 1528 (11th Cir. 1987)("In determining whether a factual issue exists, a court must consider all the evidence in the light most favorable to the non-moving party."). Negligence, however, is not enough to sustain a claim for breach of the duty of fair representation in any context. The only thing that the federal courts seem to be in agreement on with respect to the duty of fair representation is that mere negligence is not a breach of this duty. **See Higdon v. United Steelworkers of America,** 706 F. 2d 1561, 1562 (11th Cir. 1983)(per curiam); **Harris,** 668 F. 2d at 1206.

[16] Because the employees have failed to show any facts to support their claims that the Union breached its duty of fair representation in the negotiation process, in its handling of their grievances, or in the ratification of the concession agreements, the employees' hybrid Section 301/fair representation claim and their separate claim for breach of the Union's duty of fair representation must fail. The hybrid Section 301/fair representation claim against the Company and Union fails because a crucial element of such a claim is a breach of the union's duty of fair representation.

[17] We now address the employees' separate claim against the Company for breach of contract. The employees claim that the Company breached provisions contained in the CBA and the concession agreements. As noted previously, the district court concluded that "H. K. Porter and Connors [were] also entitled to summary judgment, their liability under Section 301 being conditional upon the union's breaching its duty of fair representation." The grievance and arbitration clause in the CBA required mandatory arbitration over "any question relating to wages, hours of

work, and other conditions of employment or any change therein." It also provided that the decision of the arbitrator would be the final decision on the merits of the grievance. We conclude that the scope of the grievance and arbitration clause was broad enough to include all of the employees' breach of contract claims, and that all such claims should have been submitted for arbitration. The employees, therefore, cannot prevail on their claims against the Company absent a showing that the Union breached its duty of fair representation, **DelCostello, supra,** or that the arbitration award is not final because of misconduct on the part of the Union in the arbitration process. **Hines v. Anchor Motor Freight, Inc.,** 424 U.S. 554, 567, 96 S. Ct. 1048, 1057-1058, 47 L. Ed. 2d 231 (1976); **United Steelworkers of America v. Enterprise Wheel & Carl Corp.,** 363 U.S. 593, 596, 80 S. Ct. 668 F. 2d at 1206. The employees have not challenged the validity of the award and therefore their claim is barred because the CBA provides that the decision of the arbitrator shall be final.

C. The Arbitration Award

[18] We also believe that the employees are barred from raising their state fraud claims in federal court because of the finality of the arbitration award pursuant to the CBA.

The Company argues that because the employees' claims were the subject of arbitration the claims have merged with the arbitration award and are thus barred. The district court made no finding as to whether all of the claims presented to it had been presented to the arbitrator. We need not decide precisely which claims were presented to the arbitrator, because it is clear that all claims involving the CBA and the concession agreements, whether they be denoted as state fraud claims or breach of contract claims, should have been presented to the arbitrator under the terms of CBA.

In **Mason v. Continental Group, Inc.,** 763 F. 2d 1219 (11th Cir. 1985), **cert. denied,** 474 U.S. 1087, 106 S. Ct. 863, 88 L. Ed. 2d 902 (1986), this court was faced with a similar case. In **Mason,** former employees of the Continental Can Company claimed that the company closed its Alabama plant in order to avoid employment

obligations to its employees after having induced the employees to continue working on the representation that the plant would remain open. The employees brought claims against the company and their union very similar to the claims raised in the present case. This court rejected the employees' argument that "since a decision to shut down a plant for economic reasons does not fall within an arbitration clause covering 'wages, hours, and conditions of employment' . . . a cause of action for fraudulent concealment and misrepresentation of that decision would not be covered." **Id.** at 1224 (citations omitted). The **Mason** court noted that "[h]aving agreed to such a broad arbitration clause, plaintiffs are bound to submit arguably extrinsic claims, such as fraud, to the grievance and arbitration process." **Id.** at 1223. The same is true with the fraud claims raised by the employees in the instant case.

The CBA in the present case contained a provision for the adjustment of complaints and grievances. Section 9C of the agreement provided:

> Should differences arise between the Company and the Union as to the interpretation or application of or compliance with the provisions of this Agreement or as to any question relating to the wages, hours of work and other conditions of employment or any change therein . . . an earnest effort shall be made to settle the matter promptly in accordance with the following procedure. . . . [emphasis added].

In **United Steelworkers of America v. Warrior & Gulf Navigation Co.**, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 1352-1353, 4 L. Ed. 2d 409 (1960), the Supreme Court determined that "[a]n order to arbitrate [a] particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." Thus, the Supreme Court endorses an expansive reading of arbitration clauses and espouses a "presumption of arbitrability." **1 Labor Law**, at 881.

The **Mason** decision coupled with the Supreme Court's "presumption of arbitrability" convinces us that all of the employees' claims, including fraud claims, should have been submitted to arbitration, and that they are barred for this reason, whether or not they were actually submitted.

D. Recusal

After the district court issued its decision, the employees filed a motion requesting the district judge to recuse himself from the case. The memorandum opinion issued by the district court contained a footnote that reads in relevant part:

> For the formulation of this opinion, the Court is indebted to its Law Clerk, William G. Somerville, III, for his careful analysis of the massive discovery materials and his countless discussions with the Court as to how the law should be applied to the material facts as to which there is no genuine issue.[8]

The employees argue that the district court judge was required to recuse himself because his law clerk, William G. Somerville, III, was the son of William G. Somerville, Jr.,[9] a partner in the law firm of Lange, Simpson, Robinson & Somerville, the firm representing Connors and H. K. Porter. The employees also allege that Somerville's participation in the decisional process was criti-

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[8]We note that this is not an isolated case. The district judge has regularly included such footnotes in published opinions as far back as 1961. **See, e.g., Willoughby Roofing & Supply Co., Inc. v. Kajima Intern., Inc.,** 598 F. Supp. 353, 354 (N.D. Ala. 1984), aff'd, 776 F. 2d 269 (11th Cir. 1985) (per curiam); **United States Fidelity & Guaranty Co., Slifkin,** 200 F. Supp. 563, 582 (N.D. Ala. 1961).

[9]William G. Somerville, Jr., is apparently a former law clerk to Judge Lynne. See **Id.** at 582 ("Credit is due William G. Somerville, Jr., Law Clerk to the Court, for the preparation of this opinion.").

cal to the court's decision because it was Somerville who reviewed the voluminous discovery documents and determined that there were no material issues of fact that would prevent summary judgment disposition of the case.[10] Additionally, the employees allege that Somerville actually held a hearing with counsel in the absence of the district judge and later reported the result of the hearing to the judge. The employees argue that these circumstances violate 28 U.S.C. Section 455 and thus require this court to reverse and reassign this case to another judge.

The Supreme Court very recently discussed Section 455(a) and its goal of promoting public confidence in the integrity of the judicial process. In **Liljeberg v. Health Services Acquisition Corp.**, ____ U.S. _____, 108 S. Ct. 2194, 100 L. Ed. 2d 855 (1988), the Supreme Court held that scienter is not required in order to find a violation of Section 455(a). The Supreme Court stated:

> The judge's lack of knowledge of a disqualifying circumstances may bear on the question of remedy, but it does not eliminate the risk that 'his impartiality might reasonably be questioned' by other persons. . . . Moreover, advancement of the purpose of the provision—to promote public confidence in the integrity of the judicial process, . . . does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew.

Id. ____ U.S. at _____, 108 S. Ct. at 2202-2203 (citations omitted).

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[10]This argument is weakened somewhat by other language which also appears in the footnote crediting the assistance of Somerville. The district court stated: "More than two years ago the Court announced its tentative opinion that defendants were entitled to summary judgment but deferred to the request of plaintiffs' counsel that action be withheld pending the completion of discovery, which proved to be wide-sweeping." Thus, the district judge had tentatively ruled against the employees prior to Somerville's employment.

[19] Inherent in Section 455(a)'s requirement that a judge disqualify himself if his impartiality might reasonably be questioned is the principle that our system our system of "justice must satisfy the appearance of justice." **Offutt v. United States,** 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L. Ed. 11 (1954). "The very purpose of Section 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible." **Liljeberg,** _____ U.S. at _____, 108 S. Ct. at 2203-2205.

[20] Thus, section 455(a) embodies an objective standard. The test is whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds of which recusal was sought would entertain a significant doubt about the judge's impartiality. **See Potashnick v. Port City Const. Co.,** 609 F. 2d 1101, 1111 (5th Cir.), cert. denied, 449 U.S. 820, 101 S. Ct. 78, 66 L. Ed. 2d 22 (1980).[11]

[21,22] We now turn to the objective facts that might reasonably cause an objective observer to question Judge Lynne's impartiality. First, the close familial relationship between Judge Lynne's law clerk and a senior partner in the firm representing Connors and H.K. Porter might lead an objective observer, especially a lay observer,[12] to believe that Connors and H.K. Porter will

[11] **Potashnick** is binding on this court under the doctrine of **Bonnor v. City of Prichard,** 661 F. 2d 1206, 1207 (11th Cir. 1981).

[12] Generally, those trained in the law understand that a judge, or even an advocate, is able to maintain social contacts with other members in the profession without allowing these friends to have any impact whatsoever on his/her professional obligations. *See* **United States v. Murphy,** 768 F. 2d (7th Cir. 1985), **cert. denied,** 475 U.S. 1012, 106 S. Ct. 1188, 89 L. Ed. 2d 304 (1986).

> The statutory standard puts to the judge a question about the objective state of the legal and lay culture. The court must consider whether an astute observer in either culture would conclude that the relation between judge and lawyer (a) is very much out of the ordinary course, and (b) presents a potential for actual impropriety if the worst implications are realized. The inquiry is entirely objective.

768 F. 2d at 1537 (citation omitted).

receive favorable treatment from the district judge. This is compounded by the observation that William G. Somerville, Jr., is a former law clerk to Judge Lynne.[13]

Judge Lynne's practice of giving credit to his law clerk in a footnote may erroneously lead some to believe that the law clerk decided the case. While it has not been suggested that the decision in this case was made by Judge Lynne's law clerk and we have no reason to believe that was, it is not unreasonable to believe that the public may come to the conclusion. **See, e.g., Acceptance Ins. Co. v. Schafner,** 651 F. Supp. 776, 778 (N.D. Ala. 1986)("This Memorandum of Opinion was prepared by William G. Somerville, III, Law Clerk, **in which the Court fully concurs.**")(emphasis added); **Cone v. The Florida Bar,** 626 F. Supp. 132, 137 (M.D. Fla. 1985)(Judge Lynne, sitting by designation)("This opinion is the product of exhaustive research and careful analysis by Luther M. Dorr, Jr., Law Clerk."). It goes without saying that it would be improper for a judge to delegate the adjudicative function of his office to one that was neither appointed by the President nor confirmed by the Senate.

Finally, we believe that when Somerville held a hearing in Judge Lynn's absence and later reported the results of the hearing to the judge this contributed to the appearance of impropriety.[14]

We believe that these facts might cast doubt in the public's mind on Judge Lynne's ability to remain impartial and at a minimum these facts raise the appearance of impropriety. It has

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[13]We recognize, however, that ordinarily disqualification of an entire law firm is not required "when the propriety of a former law clerk's participation in a case is drawn in question." **Fredonia Broadcasting Corp., Inc. v. RCA Corp.,** 569 F. 2d 251, 255 (5th Cir.), **cert. denied,** 439 U.S. 859, 99 S. Ct. 177, 58 L. Ed. 2d 167 (1978). William G. Somerville, Jr. did not actually participate in the instant case, but his relationship with Judge Lynne's law clerk and the fact that he is a former law clerk to Judge Lynne contribute to the appearance of impropriety.

[14]There does not appear to be any dispute over the fact that Somerville held a hearing in order to determine legal positions of the parties.

been stated on numerous occasions that when a judge harbors any doubts concerning whether his disqualification is required he should resolve the doubt in favor of disqualification. **See United States v. Alabama,** 828 F. 2d 1532, 1540 (11th Cir. 1987)(per curiam), **cert. denied sub nom.,** _____ U.S. _____, 108 S. Ct. 2857, 101 L. Ed. 2d 894 (1988); **Hall v. Small Business Administration,** 695 F. 2d 175, 178-79 (5th Cir. 1983).

We express no opinion on whether any of the above facts standing along would rise to the level of a Section 455(a) violation. We merely conclude that all of these facts taken together raise the appearance of impropriety and may cause one to reasonably question Judge Lynne's impartiality.

In **Hall** the Fifth Circuit found a violation of Section 455(a) because a magistrate refused to disqualify himself after it was revealed that his law clerk was a member of the plaintiff class involved in the suit and had accepted employment with class counsel before judgment was rendered. The Fifth Circuit noted that:

> Law clerks are not merely the judge's errand runners. They are sounding boards for tentative opinions and legal researchers who seek the authorities that affect decision. Clerks are privy to the judge's thoughts in a way that neither parties to the lawsuit nor his most intimate family members may be.

Id. at 179.

This case was later characterized by the Second Circuit as involving actual bias on the part of the law clerk that was imputed to the court. **See United States v. Murphy,** 768 F. 2d at 1539 n. 3. Our decision in the instant case should not be interpreted as imputing to the district judge any appearance of impartiality on the part of the law clerk. **See In re Corrugated Container Antitrust Litigation,** 614 F. 2d 958, 968 (5th Cir.)(for purpose of determining whether a judge should disqualify himself, views of the judge's law clerk cannot be attributed to the judge), **cert. denied sub nom.,**

449 U.S. 888, 101 S. Ct. 244, 66 L. Ed. 2d 114 (1980); **cf. Hunt v. American Bank & Trust Co.**, 783 F. 2d 1011, 1015-16 (11th Cir. 1986)("A judge is not necessarily forbidden, however, to do all that is prohibited to each of his clerks."). We recognize the importance that some law clerks play in the decisional process and it is for this reason that a "'clerk is forbidden to do all that is prohibited to the Judge.'" **Id.** at 1015 (quoting **Hall**, 695 F. 2d at 179). Similarly, when a judge's law clerk has a possible conflict of interest or knows of other disqualifying factors it is the clerk, not the judge, who must be disqualified. **Id.** at 1016. This problem might have been avoided if Judge Lynne would have taken steps to isolate Somerville from this case.

[23] A law clerk, as well as a judge, should stay informed of circumstances that may raise the appearance of impartiality or impropriety. And when such circumstances are present appropriate actions should be taken. In the instant case either Judge Lynne or his law clerk must have known of the grounds for disqualification and either of them should have raised the issue. If the issue had been raised and fully disclosed the employees may have waived the grounds for disqualification.[15]

Having determined that a violation of Section 455(a) is presented, we now must determine the proper remedy.[16] In **Liljeberg** the Court noted that:

As in other areas of the law, there is surely room

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[15]28 U.S.C. Section 455(e) allows a judge to accept a waiver of any ground for disqualification under Section 455(a) after a "full disclosure on the record of the basis for disqualification."

[16]Most courts hold that section 455(a) embodies a timeliness requirement in order to prevent counsel from withholding facts which support a issue only after receiving an adverse ruling on the merits. *See, e.g.*, **United States v. Alabama**, 828 F. 2d at 1544 n. 49; **Phillips v. Amoco Oil Co.**, 799 F. 2d 1464, 1472 (11th Cir. 1986), **cert. denied**, ____ U.S. _____, 107 S. Ct. 1893, 95 L. Ed. 2d 500 (1987); *Hall*, 695 F. 2d at 179. We need not address this issue in the present case, however, because the employees' attorneys have filed affidavits stating that they did not know of the grounds for recusal until after the district court's opinion was

> for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of Section 455(a).

____ U.S. at ____, 108 S. Ct. at 2202-2203 (footnote omitted).

[24] We believe that in this case Judge Lynne's refusal to disqualify himself was indeed harmless error. In determining the proper remedy for a Section 455(a) violation the Supreme Court has suggested the following test. Consider : l) the risk of injustice to the parties in the particular case; 2) the risk that the denial of relief will produce injustice in other cases; and 3) the risk of undermining the public's confidence in the judicial process. **Id.** ____ U.S. at ____, L08 S. CT. AT 2203-2205, 56 U.S.L.W. We believe that these factors weigh heavily in favor of our conclusion that Judge Lynne's decision not to recuse himself was harmless error.

First, the risk of injustice to the parties in this case if relief is denied is nonexistent. To the contrary, if we grant the employees relief for the Section 455(a) violation and vacated the district court' decision then our action will create an injustice. The district court dismissed the case on summary judgment and therefore this court is in as good a position to determine the merits of the employees' claims as was the district court.[17] ***See*** **Rollins v. Techsouth, Inc.** 883 F. 2d at 1527 ("In reviewing a grant of summary judgment, we

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released. Counsel saw Somerville's name in the footnote and it was then that the connection between Somerville and the Company's counsel became known. Section 455 does not require a judge to accept as true all allegations made by a moving party. **See United States v. Alabama,** 828 F. 2d at 1541; **Phillips v. Joint Legislature Comm.,** 637 F. 2d 1014, 1019-20 n. 6 (5th Cir. 1981), cert. denied, 456 U.S. 960, 102 S. Ct. 2035, 72 L. Ed. 2d 483 (1982). However, in this case the district judge did not hold a hearing or question the accuracy of the affidavits in any way and thus we will accept them as true.

[17]In **Phillips v. Amoco Oil Co.,** this court was faced with a similar Section 455(a) question. In that case it was claimed that an appearance of impropriety arose when the law clerk who had drafted Judge Lynne's memorandum opinion accepted employment with one of the law firms involving in the

must give the judgment plenary review, applying the same legal standards that bound the district court"). As discussed previously, we agree with the district court that summary judgment was proper. It would, therefore, be ridiculous to remand this case and reassign it to another judge after we have already exercised plenary review and have concluded that summary judgment was proper. We also note that Judge Lynne announced his tentative decision to grant the Company and the Union summary judgment prior to Somerville joining his staff. Therefore, the risk that Judge

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litigation prior to drafting the opinion. This court listed several factors that lessened any appearance of impropriety.

> The case had been before the judge for many years and many clerks had worked on it. By the time the law clerk at issue was hired, the judge had formed the conclusion that the employees' claims were without merit. Furthermore, the court; granted Norgas' motion for summary judgment at oral argument, before the law clerk began work on the opinion justifying the decision. Additionally, the claims against Norgas were meritless, if not frivolous. Finally, because this case was decided on summary judgment motions, the court was not called upon to resolve conflicts in evidence weight the credibility of witnesses or exercise judicial discretion. The district court's decision has been subjected to de novo review by this court.

799 F. 2d at 1472.

> We believe that some of these factors are properly considered in the harmless error analysis rather than in the initial determination of whether there is an appearance of impartiality . Section 455(a) requires consideration of only the objective facts, *Hall*, 695 F. 2d at 179, thus factors that tend to lessen the appearance of impartiality must likewise be objectively ascertainable. **Cf. *Liljeberg*,** ____ U.S. at ____, 108 S. Ct. at 2202-2203. Consequently, considering the merits of the case and its summary judgment disposition is more appropriate when determining whether any error was harmless error rather than when determining whether a violation of Section 455(a) has occurred.

Lynne based his decision on Somerville's involvement is remote. But see **Hall**, 695 F. 2d at 180 ("The Judge's assertion that he had made up his mind immediately after hearing the case, without the law clerk's assistance, is immaterial. Every judge has suffered a change of heart after reaching a tentative decision. Much might happen during research and opinion writing to affect the decision.")

In **Liljeberg** the Court noted that it is "appropriate to vacate the judgment unless it can be said that respondent did not make a timely request for relief, or that it would otherwise be unfair to deprive the prevailing party of its judgment." ____ U.S. at _____, 108 S. Ct. at 2205-2207 (emphasis added). As already discussed, it would be unfair to deprive the Company and the Union of their judgment under the circumstances of this case.

Next, we do not believe that denying relief in this case will produce injustice in other cases. Provided Judge Lynne refrains in the future from using law clerks to hold hearings with counsel or using law clerks whose impartiality might be questioned, there is no risk of injustice in future cases. Further, since this case was decided on summary judgment our decision will not produce any injustice in future cases.

Finally, we do not believe that the public's confidence in the judicial process will be undermined if we conclude that the Section 455(a) violation was harmless error. Since we have determined that in fact a violation occurred and strongly urge Judge Lynne to discontinue his practice of crediting the work of his law clerks, we believe that our decision will instill greater confidence in our judiciary. To the extent that public confidence has already been undermined we do not believe that granting relief in this case will change the public's perception in any appreciable way. Such harm cannot be remedied by vacating the district court's decision and reassigning this case to a different judge. In fact, if we reverse and vacate a decision that we have already determined to be proper, the public will lose faith in our system of justice because the case will be overturned without regard to the merits of the employees' claims. Judicial decisions based on such technical arguments not relevant to the merits contribute to the public's

distrust in our system of justice.

The employees also argue that Judge Lynne was disqualified from presiding over this case under 28 U.S.C. Section 455(b)(5)(iii) which would disqualify a judge whose father is a lawyer in the case.[18] **See, e.g., Potashnick,** 609 F. 2d at 1113 ("[W]hen a partner in a law firm is related to a judge within the third degree, that partner will always be 'known by the judge to have an interest that could be substantially affected by the outcome' of a proceeding involving the partners' law firm."). The employees argue that since Somerville acted as the judge's alter ego when he conducted the hearing in the judge's absence, section 455(b)(5)(iii) requires Judge Lynne's disqualification.

We do not believe that we have to reach this question in the present case. If we assume that there was a violation of Section 455(b) we believe that our discussion of the remedy for the Section 455(a) violation would also apply and reversal would not be mandated. In **Liljeberg** the Supreme Court made it clear that harmless error analysis would be appropriate for a Section 455(a) violation. See _____ U.S. at _____, 108 S. Ct. at 2202-2203. However, it was not made clear whether a violation of Section 455(b) could constitute harmless error. Section 455 neither prescribes nor prohibits any particular remedy for a violation of the duties it imposes. **Id.** ("Congress has wisely delegated to the

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[18]Section 455(b)(5)(iii) provides:

(b) [A judge] shall also disqualify himself in the following circumstances:

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. Section 455(b)(5)(iii). Grounds for disqualification under Section 455(b) cannot be waived by the parties. See 28 U.S.C. Section 455(e).

judiciary the task of fashioning the remedies that will best serve the purpose of the legislation.").

[25-27] We begin our analysis by noting some of the differences between Section 455(a) and Section 455(b). Section 455(a) may be waived by the parties after full disclosure, whereas section 455(b) may not. 28 U.S.C. Section 455(e); **United States v. Murphy**, 768 F. 2d at 1540. In addition, Section 455(b) is a per se rule that lists particular circumstances requiring recusal. **United States v. Alabama,** 828 F. 2d at 1541 ("The statute also states that the parties cannot waive the per se rules of disqualification set out in Section 455(b).") (footnote omitted). Thus, Section 455(b) is stricter than Section 455(a) and is concerned with situations that may involve actual bias rather than Section 455(a)'s concern with the public's perception of the judicial process. Nevertheless, we do not believe that these differences preclude the application of harmless error analysis in the context of a Section 455(b) violation.

We believe that this conclusion is supported by the Supreme Court's **Liljeberg** decision. When the Supreme Court outlined the test for determining whether a judgment should be vacated due to a Section 455 violation the Court did not draw any distinctions between Section 455(a) and Section 455(b). Further, in the sentence immediately preceding its test to be used when evaluating the appropriate remedy for a Section 455 violation the Court stated: "Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for all Section 455 violations." ____ U.S. at ____, 108 S. Ct. at 2203-2205 (emphasis added). Therefore, we are confident that the Supreme Court intended its test to be applied to all Section 455 violations, whether involving subsection a or subsection b. Accordingly, a determination that Section 455(b)(5)(iii) was violated in this case would not change our ruling and we decline to address the merits of the Section 455(b) claim.

CONCLUSION

We conclude that the employees' state fraud claims are arguably prohibited by section 8's requirement of good faith

bargaining and therefore are preempted under the principles recognized in **Garmon**. We do not believe that the state fraud claims touch upon local interests that are compelling enough to justify an exception to preemption nor do the claims relate to matters that are of only peripheral concern to the Labor Act. Consequently, the claims are preempted.

The employees' claims that the Union breached its duty of fair representation in negotiating the concessions, in processing their grievances, and in seeking ratification of the concessions were also properly disposed of on summary judgment. Mere negligence will not sustain a claim that the duty of fair representation has been breached in any of these contexts. The employees have not shown any genuine dispute over the material facts that would make summary judgment improper. We also hold that the claim for breach of contract against the Company is barred by the award entered in the arbitration proceeding and the finality provision of CBA.

Finally, although we conclude that it was a violation of Section 455(a) for Judge Lynne to deny the employees' motion to recuse himself from this case, we believe that it was harmless error.

AFFIRMED.

Adm. Office, U.S. Courts

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

CALVIN L. PARKER, et al.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	
vs.	)	CV-84-L-0030-S
	)	
CONNORS STEEL COMPANY, H. K. PORTER COMPANY, INC.; and UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,	)	FILED Jul 31 1987 UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ALABAMA CHARLES T. CLIVER, CLERK
Defendants.		ENTERED JUL 31 1987

JUDGMENT

In conformity with the attached Memorandum of Opinion,

It is ORDERED, ADJUDGED and DECREED by the Court that this action be and the same is hereby dismissed, and that the costs of court incurred herein be and the same are taxed to plaintiffs.

DONE this 31st day of July, 1987.

S/Seybourn H. Lynne
SENIOR JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

CALVIN L. PARKER, ET AL,	)	
	)	
Plaintiffs,	)	CIVIL ACTION NO.
	)	
v.	)	CV-84-L-0030-S
	)	
CONNORS STEEL COMPANY, H. K. PORTER COMPANY, INC.; and UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,	)	FILED Jul 31 1987 UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ALABAMA CHARLES T. CLIVER, CLERK
	)	ENTERED JUL 31 1987
Defendants.	)	

MEMORANDUM OF OPINION

This is an action by the bargaining unit a the now-defunct Connors Steel, Inc. (Connors), operation at Birmingham, Alabama, for fraud, breach of the duty of fair representation, and breach of a collective bargaining agreement. For reasons set forth below, the Court now grants summary judgment in favor of all remaining defendants.

FACTS

In the latter part of 1981, officials of Connors informed representatives of Local 2250 (Local) of the United Steelworkers (Steelworkers) that Connors' Birmingham facility was losing vast sums of money. Some of the named plaintiffs contend that they were told by Connors' officials that Connors would keep the plant open if the bargaining unit approved certain wage and benefit concessions varying the terms of the collective bargaining agreement concluded in 1980 and in effect until August 1, 1983. Other plaintiffs, however, together with all defendants, have stated that the bargaining unit was told simply that the plant would close if such concessions were not granted. Regardless of what inducements might have been offered, the bargaining unit ratified, effective July 1, 1982 Memorandum of Emergency Agreement. By the agreement's terms, if Connors returned to profitability, then the conceded wages and benefits would be restored.

The 1982 agreement proved in the long run, however, not to satisfy Connors, which sought more concessions in the latter part of 1982. The bargaining unit and Connors concluded yet another Memorandum of Emergency Agreement, this one dated February 24, 1983. Again, the representative plaintiffs disagree over whether or not Connors promised to keep the plant open in

return for such concessions. Like its predecessor, the 1983 agreement provided that the concessions would be repaid if the plant returned to profitability.

In August, 1983, Steelworkers and Connors submitted for the bargaining unit's approval new collective bargaining agreement to replace the one due to expire on September 1, 1983. Twice the bargaining unit's members voted on the proposal, and twice they rejected it. Shortly afterwards, Connors closed the facility and sold it.

Out of work, the plaintiffs met at a Birmingham church where they elected representatives (not certified by the NLRB) who prepared and filed grievances relating to the concessions themselves and the plant closing. The Steelworkers took these grievances to arbitration, and some of the grievances formed the basis for an award. Before the arbitration was completed, however, the plaintiffs filed this lawsuit on behalf of the entire bargaining unit, alleging that Connors and its parent company, H. K. Porter, Inc. (Porter), had intended all along to close the plant, and fraudulently induced the bargaining unit to vote for the 1982 and 1983 concession agreements. Plaintiffs also allege that Connors and Porter breached the collective bargaining agreement, and that, both in negotiating the concession agreements and in processing

the grievances, the Steelworkers and the Local breached their duty of fair representation.

DISCUSSION

This court rules, first, that the fraud claim is pre-empted by Sections 7 and 8 of the National Labor Relations Act, and that the fraud count therefore fails to state a claim upon which relief can be granted. **See Serrano v. Jones & Laughlin Steel Co.**, 790 F. 2d 1279 (6th Cir. 1986). In essence, the plaintiffs allege that Porter and Connors fraudulently obtained the 1982 and 1983 concession agreements by representing that they would keep the plant open if the employees granted such concession. Also, the plaintiffs allege, Porter and Connors intended all along to close the plant, and obtained the concessions solely in order to reduce the fixed costs of shutting it down. This count alleges nothing more than that the employers failed to bargain in good faith,* and it is thus arguably

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*As another court ruled in analyzing a virtually identical allegation, "[D]efendants had the duty to disclose any information they had concerning a shutdown of the . . . plant as it relates to concessions made in the Memorandum of the Agreement during the entire period of that agreement. Failure to make the disclosures would constitute a failure to bargain in good faith." **Serrano v. Jones & Laughlin Steel Co.**, District Court Memorandum Opinion, cited at 790 F.2d 1283.

It seems to have occurred to plaintiffs that their claims were subject to the

within the exclusive jurisdiction of the NLRB. **See San Diego Building Trades Council v. Garmon**, 359 U.S. 236 (1959). The fraud count, therefore, is due to be dismissed.

Next, the court turns to the fair representation claims against the union and local. The complaint itself alleges that this duty was breached both in the negotiation of the concession and in processing the grievances. The evidence, however, does not support the complaint in either claim. Nowhere in the substantial record lies any evidence whatever that the union acted arbitrarily, capriciously, or in bad faith. Counsel for the plaintiff strenuously argues that the record shows that the union negotiations negligently failed to ascertain the employers' fraudulent intentions; that they negligently failed to insist upon a contractual provision that would ensure repayment of the concessions and that they negligently failed to examine the employers' books adequately. Assuming for the moment that the record contained such evidence, the defendants still would be entitled to summary judg-

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jurisdiction of the NLRB; indeed, the plaintiffs filed unfair labor practice charges on November 30, 1983. On January 6, 1984, the Regional Director of Region 10 of the NLRB wrote to the plaintiffs' counsel, informing him that the charges were barred by the statute of limitations.

ment. Neither ineffectiveness nor ineptitude gives rise to a claim for breach of this duty. **Harris v. Schwerman Trucking Co.**, 668 F.2d 1204, 1207 (11th Cir. 1982); **see also Freeman v. O'Neal Steel, Inc.**, 609 F.2d 1123, 1127 (5th Cir.), cert. denied 449 U.S. 833 (1980) ("The union representative is not a lawyer and he cannot be expected to function as one."); **Conally v. Transcon Lines**, 583 F.2d 199, 203 (5th Cir. 1978)(Union representatives are not to be expected to provide "perfect" representation); **Brough v. United Steelworkers of America**, 437 F.2d 748, 750 (3rd Cir. 1970) (no cause of action exists for negligent representation); **see also R. Gorman, Basic Text on Labor Law, Unionization, and Collective Bargaining** 721 (1976) (no cause of action exists for negligence, at least in the realm of contract negotiation).

Likewise, the record contains no evidence that the arbitral award was influenced by misconduct on the part of the union. Because the parties have had ample time for discovery, and because discovery has yielded no evidence that would create a genuine issue of material fact with respect to the allegations in the complaint, or with respect to any other claims upon which relief might be granted, the defendant international and local unions are entitled to summary judgment as a matter of law. **Celotex Corp. v. Catrett**, 106 S.Ct. 2548 (1986). H. K. Porter and Connors are also

entitled to summary judgment, their liability under Section 301 being conditional upon the union's breaching its duty of fair representation. **DelCostello v. Teamsters**, 462 U.S. 151 (1983); **Vaca v. Sipes**, 386 U.S. 171 (1967)."

DONE this 31st day of July, 1987.

S/Seybourn H. Lynne
SENIOR JUDGE

**More than two years ago the Court announced its tentative opinion that defendants were entitled to summary judgment but deferred to the request of plaintiffs' counsel that action be withheld pending the completion of discovery, which proved to be wide-sweeping. For the formulation of his opinion, the Court is indebted to its Law Clerk, William G. Somerville, III for his careful analysis of the massive discovery materials and his countless discussions with the Court as to how the law should be applied to the material facts as to which there is no genuine issue.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7607

D.C. Docket No. 84-0030

CALVIN L. PARKER, GENE A. CHILDERS; MAPLE L. COPELAND, WILL GOODMAN, NATHANIEL GRANT, THOMAS RAY LOVELESS, RUBEN I. PIERCE, JOE D. PRESSLEY, VIRGIL LEE WEATHERSPOON, on their own behalf and on behalf of all other hourly wage employees of Connors Steel Company similarly situated, and as representatives of a class of persons consisting of those employees who on or afterJune 1, 1982, were employed as hourly wage earners by Connors SteelCompany and represented by the UnitedSteelworkers of America, ALF-CIO and its Local Union No. 2250,

Plaintiffs-Appellants,

versus

CONNORS STEEL COMPANY; H. K. PORTER COMPANY, INC., UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,

Defendants-Appellees,

CARL L. STATUM, TOM KIMBRELL, and JAMES E. NORMAN,

Defendants.

Appeal for the United States District Court for the Northern District of Alabama

Before HATCHETT and COX, Circuit Judges, and GIBSON*, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED;

IT IS FURTHER ORDERED that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

*Honorable Floyd R. Gibson, Senior U. S. Circuit Judge for the Eighth Circuit, sitting by designation.

Entered: September 29, 1988
For the Court: Miguel J. Cortez, Clerk

By: S/Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: DEC 23 1988

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 87-7607

FILED
U.S.COURT OF APPEALS
ELEVENTH CIRCUIT
DEC 14 1988
MIGUEL J. CORTEZ
CLERK

CALVIN L. PARKER; GENE A. CHILDERS;
MAPLE L. COPELAND; WILL GOODMAN;
NATHANIEL GRANT; THOMAS RAY LOVELESS;
RUBEN I. PIERCE; JOE D. PRESSLEY;
VIRGIL LEE WEATHERSPOON, on their own
behalf and on the behalf of all other hourly
wage employees of Connors Steel Company
similarly situated, and as representatives
of a class of persons consisting of those
employees who on or after June 1, 1982
were employed as hourly wage earners by
Connors Steel Company and represented by
the United Steelworkers of America, AFL-CIO
and its Local Union No. 2250,

Plaintiffs-Appellants,

versus

CONNORS STEEL COMPANY;
H. K. PORTER COMPANY, INC.;
UNITED STEELWORKERS OF AMERICA,
AFL-CIO,

Defendants-Appellees,

CARL L. STATUM; TOM KIMBRELL;
and JAMES E. NORMAN,

Defendants.

On Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION (S) FOR REHEARING AND SUGGESTION (S) OF REHEARING IN BANC

(Opinion September 29, 1988, 11 Cir., 198__, _____F.2d___).

Before HATCHETT and COX, Circuit Judges, and FLOYD R. GIBSON*,
Senior Circuit Judge

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing In Banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

( ) The Petition (s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion (s) of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause In Banc, and a majority of the judges in active service not having voted in favor of it, Rehearing

In Banc is DENIED.

ENTERED FOR THE COURT:

S/Joseph W. Hatchett
United States Circuit Judge

ORD-42

*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX F

IN THE CIRCUIT COURT OF JEFFERSON COUNTY,
ALABAMAEQUITY DIVISION

CALVIN L. PARKER; GENE A. CHILDERS; MAPLE L. COPELAND; WILL GOODMAN; NATHANIEL GRANT; THOMAS RAY LOVELESS; RUBEN I. PIERCE; JOE D. PRESSLEY; VIRGIL LEE WEATHERSPOON; on their own behalf and on behalf of all other hourly wage employees of Connors Steel Company similarly situated, and as representatives of a class of persons consisting of those employees who on or after June 1, 1982, were employed as hourly wage earners by Connors Steel Company and represented bythe United Steelworkers of America, AFL-CIO and its Local Union NO. 2250,

Plaintiffs,

vs.

CONNORS STEEL COMPANY; H.K. PORTER COMPANY, INC.; UNITED STEELWORKERS OF AMERCA, AFL-CIO; CARL L. STATUM; TOM KIMBRELL; AND JAMES E. NORMAN,

Defendants.

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D.L. Cockrell
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CIVIL ACTION
NO.
CV 83 505-222 JDC

FIRST AMENDED COMPLAINT

Come now the plaintiffs and amend the complaint heretofore filed in this cause to read as follows:

Parties

1. The plaintiffs, Calvin L. Parker, Gene A. Childers, Maple L. Copeland, Will Goodman, Nathaniel Grant, Thomas Ray Loveless, Ruben I. Pierce, Joe D. Pressley and Virgil Lee Weatherspoon are members of the United Steelworkers of America, AFL-CIO Local Union No. 2250 and were employed by Connors Steel Company as hourly wage earners during the period June 1, 1982, through August 31, 1983.

2. Connors Steel Company (Connors) is a domestic corporation organized and existing under the laws of the State of Alabama and located in Jefferson County and is a wholly-owned subsidiary of H. K. Porter Company.

3. H. K. Porter Company, Inc. (Porter) is a foreign corporation organized and existing under the laws of the State of Delaware, qualified to do business in the State of Alabama and which dominated and controlled the actions of Connors at all times relevant to this complaint.

4. The United Steelworkers of America, AFL-CIO (Steelworkers) is a labor union conducting its international business in Pittsburgh, Pennsylvania and through a Local Union No. 2250, located in Jefferson County, Alabama.

5. Carl L. Statum is an individual over nineteen years of age and residing in Jefferson County, Alabama.

6. Tom Kimbrell is an individual over nineteen years of age and residing in Walker County, Alabama.

7. James E. Norman is an individual over nineteen years of age and
residing in Jefferson County, Alabama.

CLASS ACTION ALLEGATIONS

8. The class of the plaintiffs herein is defined as all hourly wage employees of Connors, other than the defendants, who were represented by the United Steelworkers of America, AFL-CIO, and it Local Union No. 2250, since June 1, 1982.

9. The class of plaintiffs is so numerous that joinder of all members is impractical, numbering approximately 600 persons.

10. Common questions of law and fact will predominate in this litigation over issues peculiar to individual class members, or groups of them. Among the questions common to the class are:

(a) Whether the Steelworkers, Carl L. Statum, Tom Kimbrell and James E. Norman acted arbitrarily, capriciously, in bad faith and in a perfunctory manner when negotiating on behalf of the

plaintiffs between June 1, 1982, and the present.

(b) Whether the aforementioned arbitrary, capricious, bad faith and perfunctory conduct in negotiating agreements on behalf of plaintiffs was so grossly negligent as to be discriminatory and thereby constituted a failure on the part of the said defendants to uphold their statutory duty of fair representation of the plaintiffs;

(c) Whether the Steelworkers, Carl L. Statum, Tom Kimbrell and James E. Norman acted arbitrarily, capriciously, in bad faith and in a perfunctory manner in failing to properly prosecute the October 4, 1983, grievances filed on behalf of the plaintiffs;

(d) Whether Connors and Porter violated the September 1, 1980, Collective Bargaining Agreement by failing to compensate the plaintiffs pursuant to the September 1, 1980, Collective Bargaining Agreement following the September 1, 1983, plant closing;

(e) Whether Porter and Connors acted individually and as part of a conspiracy to perpetrate a fraud upon the plaintiffs;

(f) Whether Porter and Connors engaged in

bad faith bargaining with the Steelworkers and plaintiffs which was calculated to deprive the plaintiffs of the level of retirement, severance pay and other benefits to which they were entitled under the September 1, 1980, Collective Bargaining Agreement;

(g) Whether the conduct of Porter and Connors in the negotiations of June 1, 1982, to August 31, 1983, was violative of the National Labor Relations Act;

(h) Whether the conduct of Porter and Connors in
the negotiations of June 1, 1982, to August 31, 1983, was violative of Section 6-5-101, **Code of Alabama,** 1975.

(i) Whether the conduct of Porter and Connors in the negotiations of June 1, 1982, to August 31, 1983, was violative of Section 6-5-102, **Code of Alabama,** 1975;

(j) Whether the conduct of Porter and Connors in the negotiations of June 1, 1982, to August 31, 1983, was violative of Section 6-5-103, **Code of Alabama,** 1975;

(k) Whether the conduct of Porter and Con-

nors in the negotiations of June 1, 1982, to August 31, 1983, was violative of Section 6-5-104, **Code of Alabama**, 1975;

(l) Whether the laws of the United States and the State of Alabama imposed on Porter and Connors the duty to bargain in good faith with the class represented by the named plaintiffs;

(m) Whether the Steelworkers was in violation of its duty, imposed by the laws of the United States and the State of Alabama, to fairly and adequately represent the class of plaintiffs represented by the name plaintiffs;

(n) Whether the laws of the United States and the State of Alabama impose on the Steelworkers the duty to fairly and adequately represent the class of plaintiffs represented by the named plaintiffs;

(o) Whether Connors and Porter negotiated directly with the plaintiffs in an effort to induce the plaintiffs to vote in favor of the wage and benefit concessions proposed by Connors and Porter and whether such conduct was in violation of 29 U.S.C. Section 159;

(p) Whether Connors and Porter made false

and fraudulent misrepresentations directly to the plaintiffs in an effort to induce the plaintiffs to vote in favor of the wage and benefit concessions proposed by Connors and Porter; and,

(q) Whether Connors and Porter were engaged in a course of fraudulent conduct designed to obtain wage and benefit concessions at all of Connors' plants so that such plants could be closed more cheaply than would be the case in the event the original Collective Bargaining Agreements were to remain in full force and effect.

11. The claims of the representative parties are typical of the claims of the class. This class action is superior to the maintenance of individual suits as a vehicle for conducting this litigation which involves numerous questions of law and fact common among members of the class.

12. The plaintiffs will fairly and adequately represent the interests of all class members.

FACTUAL ALLEGATIONS

13. Connors is a wholly-owned subsidiary of Porter and was engaged in the production of steel and its related products in Birmingham, Alabama, and Huntington, West Virginia. Plaintiffs further aver that Porter completely controlled Connors through ownership of its stock and through management teams for which Connors paid Porter a management fee. The plaintiffs

aver that Connors was a mere alter ego of Porter.

14. The Steelworkers and its Local Union No. 2250 (hereinafter Local) is the union authorized to represent the non-management employees of Connors in Birmingham, Alabama, as exclusive bargaining agents. Tom Kimbrell and James E. Norman were the respective President and Vice President of the Local and were the officers in control of the Local since their election in May, 1982. Carl L. Statum is the Steelworkers' Sub-District Director for Sub-District No. 36 and is the district representative of the Steelworkers for the union employees of Connors. The Steelworkers was also the exclusive bargaining agent for the union employees of Connors at the Huntington, West Virginia plant before it was closed on July 1, 1982.

15. On or about September 1, 1980, Connors and the Steelworkers entered into a Collective Bargaining Agreement for the purpose of establishing rates of pay, hours of work, conditions of employments and a mechanism for adjustment of labor grievances. This agreement was to have a life and duration of three years, expiring on August 31, 1983.

16. On or about January 1, 1981, Connors and the Steelworkers entered into an Insurance Agreement whereby hospital and physician's service benefits, sickness and accident benefits, dental and vision care benefits were to be provided to bargaining unit employees through December 31, 1983.

17. The plaintiffs aver that at some time prior to June 1, 1982, Porter made a decision to close the active plants of Connors located in Huntington, West Virginia and Birmingham, Alabama. Porter was aware that, under the terms of the existing labor contracts, such closures would be very costly. Porter,

therefore, decided to embark on a scheme to greatly reduce such costs by representing to the Steelworkers and its members that the Connors plants in question would be closed immediately unless wage and benefit concessions were made by the employees represented by the Steelworkers. The object of this fraudulent scheme was to induce the employees represented by the Steelworkers to vote for wage and benefit concessions in the belief that such concessions would result in the plants continuing to operate and thus continue to provide employment to the employees. In truth and in fact, Porter never intended to allow Connors to continue to operate the plants, but intended to close the plants as soon as Connors had obtained all of the wage and benefit concessions possible as a result of the fraudulent scheme. Porter and Connors would thus be able to reduce the cost of closing the plants and would be able to greatly reduce wage and benefit costs as the plants operated prior to their closure.

18. Porter and Connors decided to initially implement this plan and scheme at the Connors plant located in Huntington, West Virginia. Porter and Connors were successful in obtaining wage and benefit concessions from the employees at the West Virginia plant under threat of closing the plant unless such wage and benefit concessions were obtained. The Steelworkers, representing the West Virginia employees, negotiated the agreements concerned. Connors and Porter, having obtained all the wage and benefit concessions reasonably possible, announced in May of 1982 that the West Virginia plant would be closed on or about July 1, 1982.

19. On or about June 1, 1982, encouraged by the success of the scheme in West Virginia, Connors notified the Steelworkers,

the Steelworkers Sub-District Director, Carl L. Statum, and Local officers, Tom Kimbrell and James E. Norman, that Connors Birmingham operations were suffering financial losses and that unless the plaintiff members of the Local agreed to a wage and benefit reduction, the Birmingham operation of Connors would cease. Porter and Connors had already successfully implemented the aforesaid fraudulent scheme in Huntington, West Virginia by fraudulently inducing the employees represented by the Steelworkers at that plant to make major wage and benefit concessions in the vain hope of continued employment at the plant. Thus encouraged, Porter and Connors now began to implement the scheme in Birmingham.

20. Plaintiffs aver that following the Connors' demand for wage and benefit reductions, bargaining representatives of the Steelworkers, including Carl L. Statum, Tom Kimbrell and James E. Norman entered into negotiations with Connors and Porter. Plaintiffs aver that Porter was directly involved in these negotiations. The aforesaid negotiations resulted in an agreement between the bargaining team for the Steelworkers and Connors and Porter. Ballots on the contract concession were mailed directly to the members of the Local by Carl L. Statum, Tom Kimbrell and James E. Norman on June 23, 1982.

21. The class of plaintiffs was fraudulently induced to vote in favor of the said agreement by the fraudulent representations of Connors and Porter that the wage and benefit concessions set forth in the agreement might provide a basis for keeping the Birmingham plant of Connors in operation, when, in truth and in fact, Porter and Connors had no intention of keeping the Birmingham plant of Connors in operation. The Steelworkers, through its

bargaining team, recklessly disregarded the duty to fairly and adequately represent the class of plaintiffs by failing to investigate the facts relative to Connors' and Porter's true intentions and by failing to negotiate some standards so that if the wage and benefit concessions set out in the agreement resulted in certain specific reductions in losses Porter and Connors would be obligated to continue operations of the Birmingham plant. In fact, the Steelworkers by and through the said bargaining team completely failed to negotiate any protections for the class of plaintiffs to insure that the concessions made by them would benefit them despite the fact that the Steelworkers were aware of the events at the Huntington, West Virginia plant which resulted in the closing of that plant despite the wage and benefit reductions.

22. On or about July 1, 1982, Connors, the Steelworkers and the Local entered into an Emergency Agreement whereby each hourly job base rate earnings were reduced by twenty (20) percent and the following benefits were suspended: a paid holiday for calendar year 1982; three additional paid holidays for calendar year 1983; vacation bonus for calendar year 1983; and calendar 1983 vacation and extended vacations were each shortened by one week. In addition to the aforementioned wage and benefit reductions, certain job/force reductions were authorized and certain negotiated benefits not in effect were suspended. The wage and benefit concessions contained in the Emergency Agreement were scheduled to expire on August 28, 1983.

23. On or about July 1, 1982, Porter closed the Huntington, West Virginia, division of Connors. The scheme to fraudulently obtain wage and benefit concessions had been successfully implemented there by Porter and Connors, and having obtained all

possible concessions, Porter and Connors closed the West Virginia plant saving and making large amounts of money as a result of the successful fraud.

24. In return for the wage and benefit concessions, the defendants Porter, Connors, Steelworkers, Carl L. Statum, Tom Kimbrell and James E. Norman negotiated the January 21, 1983, Deferred Compensation Plan, whereby restoration payments for the wages and benefits lost under the July 1, 1982, Emergency Agreement would be made to union employees if post-1984, calendar year profits exceeded Four Million Dollars ($4,000,000.00) a year. The restoration payments were limited to fifty (50) percent of the amount by which profit exceeded Four Million Dollars ($4,000,000.00) a year. This provision was a deliberate and intentional fraud on the part of Porter and Connors as they had no intention at the time of entering into this agreement to continue to operate the Birmingham plant long enough to make such a provision a reality.

25. On or about February 1, 1983, Connors and Porter notified the Steelworkers, Carl L. Statum, Tom Kimbrell and James E. Norman that the 1982 wage and benefit concessions were inadequate, that Connors was continuing to lose money, and that unless the September 1, 1980, Collective Bargaining Agreement, as amended by the July 1, 1982, Emergency Agreement, was further amended, Porter would cause Connors to close its Birmingham operations by March 1, 1983.

26. On or before February 9, 1983, the Steelworkers, and its bargaining representatives Carl L. Statum, Tom Kimbrell and James E. Norman began negotiating further wage and benefit reductions on behalf of the members of the Local. These wage and

benefit reduction negotiations resulted in an agreement between the Steelworkers and its bargaining team and Connors. Ballots on a second wage and benefit reduction were mailed directly to the members of the Local by Carl L. Statum, Tom Kimbrell and James E. Norman on February 16, 1983.

27. Porter and Connors negotiated the agreement in bad faith and fraudulently in that Porter and Connors never intended to continue to operate the Birmingham plant and obtained the wage and benefits concession to reduce costs of closing the facility. In fact, these negotiations were simply another step in the implementation of the fraudulent scheme of Connors and Porter as set forth above. The Steelworkers and Statum, Kimbrell and Norman failed to fairly represent the plaintiffs in the said negotiations. In fact, despite the West Virginia example and the failure of Connors and Porter to be satisfied with the 20% concessions already obtained, no protections were negotiated to insure the plaintiffs' sacrifice would benefit them.

28. On or about March 1, 1983, Connors, Steelworkers and the Local entered into the Memorandum of 1983 Emergency Agreement which further modified the September 1, 1980, Collective Bargaining Agreement. The substantative wage and benefit provisions of the agreement provided for another twenty (20) percent reduction in the hourly job base rate, eliminated the dental and vision insurance plan, eliminated another week from the existing regular vacation schedule and deleted the following benefits: Sunday premium, shift differential, savings and vacation plan and supplemental unemployment benefits (S.U.B.) contributions. In return for the wage and benefit concessions, Porter and Connors fraudulently agreed to attempt to repay the

additional wage and benefit reductions through a scheme whereby fifty (50) percent of the monthly income before taxes would be distributed to the employees; provided that the employee's distributable share exceeded Fifty Thousand Dollars ($50,000.00) in one month, and then it would accumulate until said amount exceeded Fifty Thousand Dollars ($50,000.00). The Memorandum of 1983 Emergency Agreement also provided that the Agreement would become void if Connors were sold or terminated operations. The wage and benefit reductions contained in the Memorandum of 1983 Emergency Agreement were to expire on August 28, 1983, Porter and Connors knew that this repayment plan was a fraudulent representation as Porter and Connors had no intention of operating the plant in Birmingham for a period sufficient to allow such plan to be implemented.

29. During the period preceding the Memorandum of 1983 Emergency Agreement, Porter and Connors negotiated directly with the plaintiffs in violation of 29 U.S.C. Section 159. Moreover, such negotiations were conducted by fraudulent means. For example, on February 17, 1983, Connors sent a letter directly to the plaintiffs urging a favorable vote for the 1983 Emergency Agreement. This letter contained a number of false and fraudulent representations. Among these were the following:

(a) That the concessions in the agreement would "buy time" for the plant to return to profitability and thus save the jobs of the plaintiffs, when Porter and Connors had no intention of keeping the plant open;

(b) That the concessions would be repaid when Connors returned to profitability, though Porter and Connors knew this would not happen; and,

(c) That the alternative to the concession for most of the plaintiffs would be unemployment, when Porter and Connors knew that his would be the result of whether or not the concessions were accepted by the plaintiffs.

30. Plaintiffs aver that during the summer of 1983 negotiations to replace the September 1, 1980, Collective Bargaining Agreement, Connors notified the Steelworkers, Carl L. Statum, Tom Kimbrell and James E. Norman that the financial situation at Connors had improved but that the improvements were not sufficient to satisfy Connors' parent company, Porter. Connors demanded that the members of the Local accept a new three year agreement that essentially incorporated the wage and benefit reductions of the 1982 and 1983 Emergency Agreements, incorporated a pay back plan similar to the one contained in the 1983 Memorandum of Emergency Agreement, and authorized Connors to terminate the Labor, Insurance and Pension agreements upon thirty (30) days' notice. Plaintiffs aver that this was the final step in the implementation of the fraudulent plan and scheme established by Porter and Connors. The thirty day cancellation clause would allow Porter and Connors to close the Birmingham plant at any time of their choosing by giving thirty days' notice to the Steelworkers and that the closing would be effected at the

reduced rates of wages and benefits obtained as a result of the fraudulent scheme.

31. Plaintiffs aver that the proposed Collective Bargaining Agreement was rejected by the majority of the members of the Steelworkers Local and that Porter caused Connors to close its Birmingham plant on September 1, 1983. Connors and Porter again negotiated with the Steelworkers in bad faith. Connors and Porter never intended to continue operating the Birmingham plant and sought this last agreement only to reduce the costs of closing the plant.

32. The Plaintiffs aver that they did not, and , in the exercise of reasonable diligence could not, discover the fraud and the other wrongdoings of the defendants until August 4, 1983.

33. Plaintiffs aver that on October 4, 1983, seven (7) grievances were filed on behalf of the plaintiff members of the Local and that plaintiffs allege these grievances are not being properly processed by the defendants Steelworkers, Kimbrell, Norman and Statum.

34. Plaintiffs aver that the Local president, Tom Kimbrell, and vice president, James E. Norman, have abandoned their positions as Local officers in that they have failed to hold regular monthly meetings of the Local since September, 1983, pursuant to the Local constitution and by-laws, that the officers have failed to faithfully prosecute the grievances filed on October 4, 1983, and that the officers have failed to communicate the present status of the October 4, 1983, grievances to the local membership. Plaintiffs aver they are without meaningful representation at this time.

FIRST CAUSE OF ACTION

35. The plaintiffs incorporate by reference each and every allegation of the preceding paragraphs as if fully set out herein.

36. The plaintiffs aver that the defendants, Steelworkers, Statum, Kimbrell and Norman acted arbitrarily, capriciously, in bad faith and in a perfunctory manner when negotiating the July 1, 1982, Emergency Agreement, and the March 1, 1983, Memorandum of Emergency Agreement with Connors in that they: (a) failed to properly investigate and evaluate the alleged financial difficulties of Connors before entering into wage and benefit concession negotiations on behalf of the Local members; (b) failed to properly investigate and evaluate the wage and benefit concessions contained in the July 1, 1983, Emergency Agreement to ascertain whether said concessions would alleviate the alleged financial difficulty of Connors; (c) failed the properly investigate and evaluate the wage and benefit concessions contained in the March 1, 1983, Memorandum of Emergency Agreement to ascertain the said concessions contained in that agreement would guarantee the financial stability of the Company; (d) failed to secure adequate assurances of benefit restoration following a plant sale or closing by Connors; (e) failed to negotiate in either agreement any standards to insure that it the wage and benefit concessions amounted to a certain savings that Porter and Connors would be obligated to continue operation of the Birmingham plant; and that they (f) violated the constitution and by-laws of the Local by failing to call meetings to discuss the two concession agreements and by failing to provide for secret ballot

ratification votes on the July 1, 1982, and March 1, 1983, concession agreements. The plaintiffs further aver that the defendants, Steelworkers, Statum, Kimbrell and Norman through the aforementioned arbitrary, capricious, bad faith and perfunctory actions in negotiating the concessions to the 1980 Collective Bargaining Agreement did violate their statutory duty to fairly represent the rank and file membership of the Local, the plaintiffs, by their conduct in the negotiation and ratification process which were so grossly negligent as to be discriminatory and that said failure to properly represent the membership of the Local has caused the plaintiffs to lose wages and benefits and suffer other damages.

WHEREFORE, THE PREMISES CONSIDERED, the plaintiffs demand a judgment against the defendants Steelworkers, Statum, Kimbrell and Norman in the amount of Five Million Dollars ($5,000,000.00), a reasonably attorney's fee, the costs of this action and any and all other relief to which the plaintiffs may be entitled.

SECOND CAUSE OF ACTION

37. Plaintiffs incorporate by reference each and every allegation of the preceding paragraphs as if fully set out herein.

38. Plaintiffs aver that the defendants, Connors and Porter have violated the September 1, 1980, Collective Bargaining Agreement as amended by the July 1, 1982, Emergency Agreement and March 1, 1983, Memorandum of Emergency Agreement in that following the September 1, 1983, closing of the

Connors plant in Birmingham, Alabama, Connors and Porter failed to compensate the plaintiffs pursuant to the July 1, 1980, Collective Bargaining Agreement.

39. Plaintiffs aver that the continued prosecution of the October 4, 1983, grievances filed with the Local is futile and should therefore be excused in that Kimbrell, Statum, Norman and the Steelworkers have failed to fairly and adequately represent the plaintiffs in such grievances proceedings; Kimbrell and Norman have abandoned their offices as President and Vice President of the Local; the grievances concern events in which the Steelworkers, its local representatives and officers were involved; and in which the Steelworkers and its local representatives and officers acted arbitrarily, capriciously, in bad faith and in a perfunctory manner in violation of their duty of fair representation of the plaintiffs.

40. Plaintiffs aver that the Steelworkers, Statum, Kimbrell and Norman have acted arbitrarily, capriciously, in bad faith and in a perfunctory manner in arbitrating or failing to arbitrate the October 4, 1983, grievances filed on behalf of the plaintiffs, and that said actions constitute a violation of their fiduciary duty of fair representation.

41. As a result of Connors and Porter's violation of the September 1, 1980, Collective Bargaining Agreement and the Steelworkers, Statum, Kimbrell, and Norman's breaches of their duty of fair representation, the plaintiffs have been wrongfully denied the benefits of the September 1, 1980, Collective Bargaining Agreement and have been caused to lose wages and benefits, and suffered other damages, including mental distress and injury.

WHEREFORE, THE PREMISES CONSIDERED, the plaintiffs demand a judgment against Connors, Porter, the Steelworkers, Statum, Kimbrell, and Norman in the amount of Five Million Dollars ($5,000,000.00), a reasonable attorney's fee, costs of this action and any and all other relief to which the plaintiffs may be entitled.

THIRD CAUSE OF ACTION

42. Plaintiffs incorporate by reference each and every allegation of the preceding paragraphs as if fully set out herein.

43. Plaintiffs aver the following with respect to the defendants Porter and Connors:

(a) Plaintiffs aver that the decisions affecting the continued operation of Connors' Birmingham facility, and the decision to seek wage and benefit reductions from the membership of Steelworkers Local were made by Porter.

(b) Plaintiffs aver that before, during and after the negotiations which led to the July 1, 1982, Emergency Agreement between the Steelworkers, plaintiffs and Connors, Porter, knew or should have known that achieving profitability at the Birmingham facility of Connors by September 1, 1983, through wage and benefit reductions, as represented to the plaintiffs, was not possible.

(c) Plaintiffs aver that the January 21, 1983, deferred compensation plan which was adopted as a codicil to the July 1, 1982, Emergency Agreement, was negotiated by Connors with the intent to deceive the plaintiffs into believing that the wage and benefit concessions made in the July

1, 1982, Emergency Agreement could be recovered through profitable operations of Connors exceeding Four Million Dollars ($4,000,000.00) per year after calendar year 1984; when in fact Porter and Connors knew or should have known that said profitable operations were not possible or that said company would not be operating at that time.

(d) Plaintiffs aver that before, during and after the negotiations which led to the wage and benefit concessions contained in the March 1, 1983, Memorandum of Emergency Agreement between Connors and Steelworkers of Local, Porter knew or should have known that achieving profitability at the Birmingham facility of Connors by September 1, 1983, through wage and benefit concessions, as represented to the plaintiffs, was not possible.

(e) Plaintiffs aver that the Pay Back Plan was an integral part of the March 1, 1983, Memorandum of Emergency Agreement and was negotiated by Connors and Porter with the intent to deceive the plaintiffs into believing that profitable operations of the Birmingham facility of Connors were possible and that wage and benefit concessions made in the agreement could be recovered through profitable operation of Connors; when in fact, Porter and Connors knew or should have known that said profitable operations were not possible and that no wage and benefit reductions would be recovered because the facility would be closed by Porter.

(f) Plaintiffs aver that Porter represented that if the plaintiffs made wage and benefit concessions, new product lines would be initiated to help achieve profitability at the Birmingham facility of Connors. Plaintiffs further aver that said representations of new product lines were made

for the sole purpose of securing additional wage and benefit concessions and that the defendant Porter had no intention of permanently expanding into new areas of operation at the Birmingham facility of Connors.

(g) Plaintiffs aver that any and all modernization of the steelmaking facilities at Connors' Birmingham plant were not made for the purpose of continued operation and meeting the alleged profit objectives at the Birmingham facility of Connors as represented to the plaintiffs, but were made to prepare the facility to be closed at the expiration of the September 1, 1980, Collective Bargaining Agreement so that Connors' parent company, Porter could receive significant tax benefits from the sale or other disposition of Connors.

(h) Plaintiffs aver that the wage and benefit concessions demand by Connors and Porter in the July 1, 1982, Emergency Agreement and November 1, 1983, Memorandum of 1983 Emergency Agreement, were not demanded for the purpose of continued operation and attaining alleged profitable operations at the Birmingham facility of Connors as represented to the plaintiffs, but were calculated to deprive the plaintiffs of their compensation and benefits and level of retirement, severance pay, and other benefits to which the plaintiffs were entitled under the original September 1, 1980, Collective Bargaining Agreement.

(i) Plaintiffs aver that the wage and benefit concessions sought by Connors at the Birmingham facility and the accompanying closing of the plant, followed by an attempt to sell the facility, does follow a similar scheme utilized by the defendant Porter when Porter closed its Connors facility in Huntington, West Virginia, during 1982.

44. Plaintiffs aver that defendants Porter and Connors acted in their individual capacities and as members of a conspiracy, and did commit the aforementioned overt acts to perpetrate a fraud on the plaintiffs in that they: (a) did make the aforesaid misrepresentations of material fact willfully to deceive the plaintiffs, or recklessly without knowledge, or by mistake, and the plaintiffs relied on said misrepresentations to their detriment, and therefore, Porter and Connors are liable to the plaintiffs for fraud pursuant to Section 6-5-101, **Code of Alabama**, 1975; (b) suppressed the aforesaid material facts and that said suppression of the material facts constitutes a fraud on the plaintiffs, since Porter and Connors had an obligation to communicate all the material facts to the plaintiffs and failed to do so and that said failure to communicate the facts caused injury to the plaintiffs, Porter and Connors are liable to the plaintiffs pursuant to Section 6-5-102, **Code of Alabama**, 1975; (c) Porter and Connors did make the aforesaid willful misrepresentations of material facts to the plaintiffs to induce the plaintiffs to act, that the plaintiffs did, in fact, rely on these willful misrepresentations, suffering monetary loss and other damages whereby the defendants Porter and Connors are liable to the plaintiffs pursuant to Section 6-5-103, **Code of Alabama**, 1975, and that (d) the defendants Porter and Connors did willfully deceive the plaintiffs with the intent to induce them to alter their positions to their injury; by suggesting facts to the plaintiffs which were not true and which the defendants knew were not true or had no reasonable ground for believing were true, and through reliance on said misrepresentations by Porter and Connors the plaintiffs suffered a loss whereby the defendants are

liable to them pursuant to Section 6-5-104, **Code of Alabama**, 1975.

WHEREFORE, THE PREMISES CONSIDERED, the plaintiffs demand a judgment against Porter and Connors in the amount of Fifty Million Dollars ($50,000,000.00), a reasonable attorney's fee, the costs of this action, and any and all additional relief to which the plaintiffs may be entitled.

FOURTH CAUSE OF ACTION

45. Plaintiffs incorporate by reference each and every allegation of the preceding paragraphs as if fully set out herein.

46. Plaintiffs aver that the defendants Connors and Porter conducted the negotiations prior to the July 1, 1982, Emergency Agreement and March 1, 1983, Memorandum of 1983 Emergency Agreement in bad faith, calculated to deprive the plaintiffs of their level of retirement, severance pay and other closing benefits to which the plaintiffs were entitled to under the original September 1, 1980, Collective Bargaining Agreement, and as a result of the bad faith negotiations on the part of Connors and Porter, the plaintiffs suffered a loss of said wages and benefits.

WHEREFORE, THE PREMISES CONSIDERED, the plaintiffs demand a judgment against the defendants Connors and Porter, in the amount of TEN MILLION DOLLARS ($10,000,000.00), reasonable attorney's fee, the costs of this action and any and all additional relief to which the plaintiffs may be entitled.

S/W. Eugene Rutledge
W. Eugene Rutledge
Attorney for Plaintiffs

OF COUNSEL:

W. EUGENE RUTLEDGE
& ASSOCIATES, P.C.
1300 Brown Marx Tower
Birmingham, Alabama 35203
(205) 322-8761

JURY DEMAND

Plaintiffs demand a trial by struck jury.

S/W. Eugene Rutledge
W. Eugene Rutledge

PLAINTIFFS' ADDRESSES:

Calvin L. Parker
601 Edgemoor Drive
Birmingham, Alabama 35209

Gene A. Childers
Post Office Box 294
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Joe D. Pressley
1501 Woodland Avenue
Birmingham, Alabama 35211

Virgil Lee Weatherspoon
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Birmingham, Alabama 35234

SERVE DEFENDANTS AT:

BY CERTIFIED MAIL:

Connors Steel Company
c/o Agent for Service of Process:
Richard A. Ball
60 Commerce Street
Montgomery, Alabama 36103

H. K. Porter Company, Inc.
c/o Agent for Service of Process:
The Corporation Company
60 Commerce Street
Montgomery, Alabama 36103

Tom Kimbrell
Route 2, Box 238
Jasper, Alabama 35501

Lynn William
Acting Temporary President
United Steelworkers of America, AFL-CIO
5 Gateway Center
Pittsburgh, Pennsylvania 15222

Carl L. Statum
1825 Morris Avenue
Suite B
Birmingham, Alabama 35203

James E. Norman
1123 Appalachee Street
Birmingham, Alabama 35234

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALBAMA
SOUTHERN DIVISION

CALVIN L. PARKER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION
	)	NO. 84-L-0030-S
	)	
	)	
CONNORS STEEL COMPANY,	)	
et al.,	)	
	)	
Defendants.	)	

ANSWER

Come now Defendants, United Steelworkers of America, AFL-CIO, Carl L. Statum, Tom Kimbrell, and James E. Norman, and for answer for the First Amended Complaint, state as follows:

1. Defendants deny that the name Plaintiffs, except

possibly Plaintiff, Ruben I. Pierce, and Plaintiff, Maple L. Copeland, are members in good standing of the United Steelworkers of America, AFL-CIO, Local Union No. 2250, as alleged in paragraph 1 of the Complaint. Defendants admit Plaintiffs were employed by Defendant, Connors Steel Company, as hourly wage earners. Except as herein admitted, all other allegations contained in paragraph 1 are denied.

2. For answer to paragraph 2 of the Complaint, Defendants admit that Connors Steel Company operated a plant facility in Jefferson County, Alabama. Defendants are without sufficient knowledge or information to either admit or deny the exact corporate status of Connors Steel Company.

3. Defendants admit that H. K. Porter Company, Inc., is a foreign corporation as alleged in paragraph 3 of the Complaint. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in paragraph 3 of the Complaint.

4. For answer to paragraph 4 of the Complaint, Defendants admit the United Steelworkers of America, AFL-CIO (Steelworkers), is a labor Union with its headquarters in Pittsburgh, Pennsylvania. Defendants further admit Local Union No. 2550 was an affiliated Local Union, located in Jefferson County, Alabama. Except as herein admitted, all other allegations contained in paragraph 4 are denied.

5. Defendants admit each and every allegation contained in paragraphs 5, 6 and 7 of the Complaint.

6. For answer to paragraphs 8, 9, 10 and its subparts, 11 and 12 of the Complaint, Defendants deny each and every allegation contained therein.

7. For answer to paragraph 13 of the Complaint, Defendants admit Connors was engaged in the production of steel and its related products in Birmingham, Alabama, and at sometime in Huntington, West Virginia, as alleged in paragraph 13 of the Complaint. Defendants are without sufficient knowledge or information to either admit or deny the remaining allegations contained in paragraph 13 of the Complaint, and therefore said allegations are denied with strict proof thereof demanded.

8. For answer to paragraph 14 of the Complaint, Defendants admit the Steelworkers was the exclusive bargaining representative of certain employees of Connors in Birmingham, Alabama, and that the Steelworkers and its affiliated Local Union No. 2250 represented said employees with respect to wages, terms and conditions of employment. Defendants further admit that Defendant, Tom Kimbrell, and Defendant, James E. Norman, were the respective President and Vice-President of Local Union No. 2250 since their election in May, 1982. Defendants further admit that Defendant, Carl L. Statum, is a Sub-District Director for the Steelworkers working out of District 36 of the Steelworkers and was the Steelworkers representative assigned to service Local Union No. 2250. Defendants admit the Steelworkers was the exclusive bargaining representative for certain employees of Connors at Huntington, West Virginia. Except as herein admitted, all other allegations contained in paragraph 14 are denied.

9. Defendants admit the allegations contained in paragraph 15 of the Complaint.

10. For answer to paragraph 16 of the Complaint, Defendants admit Connors and the Steelworkers entered into an Insurance Agreement covering health benefits. Said Agreement

became effective on or about January 1, 1981, with a duration through December 31, 1983. Except as herein admitted, all other allegations contained in paragraph 16 are denied.

11. For answer to paragraph 17 of the Complaint, said allegations are directed to Defendants Porter and Connors and allege certain metal operations relative to those Defendants. No answer is required from answering Defendants. Defendants are without sufficient knowledge or information to either admit or deny the allegations contained in paragraph 17 of the Complaint.

12. For answer to paragraph 18 of the Complaint, Defendants admit the Steelworkers negotiated with Porter and Connors in West Virginia and reached certain agreements. Defendants further admit the Connors West Virginia facility closed. Except as herein admitted, all other allegations contained in paragraph 18 are denied.

13. For answer to paragraph 19 of the Complaint, Defendants admit in 1982 the Defendant Connors notified Carl Statum and officers of Local Union No. 2250 that Connors' Birmingham operation was suffering financial loss as alleged in paragraph 19 of the Complaint. Defendants further admit Connors requested negotiations over the Birmingham operation. Defendants are without sufficient knowledge or information to either admit or deny any scheme or mental operation attributable to Porter and Connors. Except as herein admitted, all other allegations contained in paragraph 19 are denied.

14. For answer to paragraph 20 of the Complaint, Defendants admit that following the Connors' request for negotiations, representatives of the Steelworkers including Statum, Kimbrell and Norman entered into negotiations with Connors as

alleged in paragraph 20 of the Complaint. Defendants further admit said negotiations resulted in an agreement between representatives and that said agreement was ratified by secret ballot mailing to the membership of Local Union No. 2250. Except as herein admitted, all other allegations contained in paragraph 20 are denied.

15. For answer to paragraph 21 of the Complaint, Defendants are without sufficient knowledge or information to either admit or deny the mental operations attributable to Connors and Porter. Except as herein admitted, all other allegations contained in paragraph 21 are denied.

16. For answer to paragraph 22 of the Complaint, Defendants admit that on or about July 1, 1982, Connors and the Steelworkers on behalf of Local Union No. 2250 entered into an Emergency Agreement as alleged in paragraph 22 of the Complaint with said Agreement to expire on August 28, 1983. Defendants admit the reduction of wages and suspension of benefits as alleged in paragraph 22 are correct, except Defendants state said Agreement speaks for itself. Except as herein admitted, all other allegations contained in paragraph 22 are denied.

17. For answer to paragraph 23 of the Complaint, Defendants are without sufficient knowledge or information to either admit or deny mental operations attributable to Porter and Connors. Defendants admit the closure of the Huntington, West Virginia, facility. Except as herein admitted, all other allegations contained in paragraph 23 are denied.

18. For answer to paragraph 24 of the Complaint, Defendants admit the Steelworkers, Statum and the negotiating committee of Local Union No. 2250 negotiated a Deferred Com-

pensation Plan for restoration of wages and benefits reduced under the Emergency Agreement. Defendants state the allegations contained in paragraph 24 relating to the formula for restoration is substantially correct, but Defendants state said Deferred Compensation Plan speaks for itself. As to the last sentence of paragraph 24, Defendants are without sufficient knowledge or information to either admit or deny mental operations attributable to Porter and Connors. Except as herein admitted, all other allegations contained in paragraph 24 are denied.

19. Defendants admit the allegations contained in paragraph 25 of the Complaint.

20. Defendants admit the allegations contained in paragraph 26 of the Complaint, and Defendants further state the bargaining team by secret ballot mailings provided for membership ratification.

21. For answer to paragraph 27 of the Complaint, Defendants are without sufficient knowledge or information to either admit or deny the mental operations attributable to Porter and Connors. Defendants deny each and every allegation contained in paragraph 27 of the Complaint.

22. For answer to paragraph 28 of the Complaint, Defendants admit that on or about March 1, 1983, Connors, the Steelworkers and Local Union No. 2250 entered into the Memorandum of 1983 Emergency Agreement as alleged in paragraph 28 of the Complaint. Said Agreement provided for a further reduction of wages and suspension of benefits, and said Agreement speaks for itself. Defendants further admit the parties agreed to a restoration of said wage reductions and benefit suspensions. Defendants are without sufficient knowledge or information to

either admit or deny the mental operations attributable to Porter and Connors. Except as herein admitted, all other allegations contained in paragraph 28 are denied.

23. For answer to paragraph 29 of the Complaint, Defendants are unable to respond to the allegations pertaining to negotiations in violation of 29 U.S.C. Section 159. For further answer to paragraph 29, Defendants state that Connors may have urged bargaining unit employees to vote favorably for the 1983 Emergency Agreement. For further answer, Defendants are without sufficient knowledge or information to either admit or deny the mental operations attributable to Connors. Except as herein admitted, all other allegations contained in paragraph 29 are denied.

24. Defendants admit negotiations between Connors, the Steelworkers, Statum and the Local Union No. 2250 bargaining team commenced in the summer of 1983. Defendants admit Connors informed Defendants that the financial situation of Connors had improved but that the improvements were not sufficient. Defendants admit Connors proposed that members of Local Union No. 2250 accept a new three (3) year agreement that essentially incorporated the wage and benefit reductions of the 1982 and 1983 Emergency Agreements and which incorporated a back pay plan similar to the one contained in the 1983 Memorandum of Emergency Agreement, and which authorized Connors to terminate the Labor, Insurance and Pension Agreements upon thirty (30) days notice. Defendants are without sufficient knowledge or information to either admit or deny the mental operations attributable to Porter and Connors as alleged in paragraph 30. Except as herein admitted, all other allegations contained in para-

graph 30 are denied.

25. For answer to paragraph 31 of the Complaint, Defendants admit that said proposed proposal by Connors referred to in paragraph 30 was rejected on two (2) occasions by a majority of the members of the Local and that the Connors' plant facility in Birmingham, Alabama, was closed on September 1, 1983. Defendants are without sufficient knowledge or information to either admit or deny the mental operations attributable to Connors and Porter. Except as herein admitted, all other allegations contained in paragraph 31 are denied.

26. Defendants deny each and every allegation contained in paragraph 32 of the Complaint.

27. For answer to paragraph 33 of the Complaint, Defendants admit that seven (7) grievances were filed on behalf of members of Local Union No. 2250, but Defendants deny each and every other allegation contained in paragraph 33 of the Complaint. Defendants further state that contractual arbitration is pending against Connors with respect to many of the claims set forth in the seven (7) grievances.

28. Defendants deny each and every allegation contained in paragraph 34 of the Complaint, except Defendants admit there have been no monthly meetings of Local Union No. 2250 since September, 1983.

29. For answer to paragraph 35 of the Complaint, Defendants incorporate by reference each and every answer to the preceding paragraph allegations of the Complaint herein.

30. Defendants deny each and every allegation contained in paragraph 36 of the Complaint.

31. Defendants deny the Plaintiffs are entitled to any

relief or judgment as prayed for in the First Cause of Action herein.

32. Defendants incorporate by reference each and every answer to the preceding paragraph allegations of the Complaint herein.

33. For answer to paragraph 38 of the Complaint, Defendants state the Steelworkers have a contractual arbitration pending in which the Steelworkers have alleged Connors has violated certain terms of the July 1, 1980, Collective Bargaining Agreement and other Agreements. Except as herein admitted, all other allegations contained in paragraph 38 are denied.

34. Defendants deny each and every allegation contained in paragraph 39.

35. Defendants deny each and every allegation contained in paragraph 40.

36. Defendants deny each and every allegation contained in paragraph 41.

37. Defendants deny the Plaintiffs are entitled to any relief or judgment as prayed for in the Second Cause of Action herein.

38. Defendants incorporate by reference each and every answer to the preceding paragraph allegations herein.

39. For answer to paragraph 43 of the Complaint, said allegations are directed against Defendants Porter and Connors, and no answer is required by Defendants Steelworkers and individuals. For further answer, Defendants are without sufficient knowledge or information to either admit or deny the mental operations of Defendants Porter and Connors as alleged in paragraph 43.

40. For answer to paragraph 44 of the Complaint,

Defendants are not required to respond to conclusory allegations of Law. For further answer, Defendants are without sufficient knowledge or information to either admit or deny the mental operations of Porter and Connors as alleged in paragraph 44 of the Complaint. Except as herein admitted, all other allegations contained in paragraph 44 are denied.

41. Defendants deny the Plaintiffs are entitled to any relief or judgment as prayed for in the Third Cause of Action herein.

42. Defendants incorporate by reference each and every answer to the preceding paragraph allegations herein.

43. For answer to paragraph 46 of the Complaint, Defendants are without sufficient knowledge or information to either admit or deny the mental operations attributable to Connors and Porter. Except as herein admitted, all other allegations contained in paragraph 46 are denied.

44. Defendants deny the Plaintiffs are entitled to any relief or judgment as prayed for in the Fourth Cause of Action herein.

NOW having answered each and every allegation contained in Plaintiffs' First Amended Complaint, Defendants, United Steelworkers of America, AFL-CIO, Carl L. Statum, Tom Kimbrell James E. Norman, set forth affirmatively the following defenses:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted.

SECOND DEFENSE

The Plaintiffs cannot satisfy any prerequisite set forth in Rule 23 of the Federal Rule of Civil Procedure for the maintenance of this action as a class action.

THIRD DEFENSE

All or some of the claims set forth in the Complaint, are barred by the applicable statute of limitations and/or laches.

FOURTH DEFENSE

All or some of the claims raised in the First Amended Complaint are subject to the primary and exclusive jurisdiction of the National Labor Relations Board.

FIFTH DEFENSE

All or some of said claims are subject to dismissal by virtue of the doctrine of preemption.

SIXTH DEFENSE

The Plaintiffs, and the class Plaintiffs purport to represent, have failed to exhaust their contractual remedies. All or some of the claims raised by the First Amended Complaint are subject to final and binding contractual arbitration which is currently pending. The First Amended Complaint fails to set forth any facts which show futility in exhaustion of the exclusive remedy set forth in the Collective Bargaining Agreement.

SEVENTH DEFENSE

The Plaintiffs' First Amended Complaint fails to set forth

any factual matters which would tend to indicate Defendants failed to represent the members of Local Union No. 2250. The allegations of the First Amended Complaint in this regard are merely conclusory and should be stricken.

EIGHTH DEFENSE

The Plaintiffs are not entitled to punitive damages as against these Defendants.

NINTH DEFENSE

The Plaintiffs are not entitled to trial by jury in this action.

TENTH DEFENSE

The First Amended Complaint fails to state a claim against individual Defendants.

WHEREFORE, Defendants, United Steelworkers of America, AFL-CIO, Carl L. Statum, Tom Kimbrell and James E. Norman, respectfully pray this action be dismissed as against them with an award of costs and attorney's fees in their favor.

Respectfully submitted,

COOPER, MITCHELL
& CRAWFORD

By: /l.s./ Robert H. Stropp, Jr.
Robert H. Stropp, Jr.

409 North 21st Street
Birmingham, Alabama 35203
(205) 328-9576

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Answer has been served on W. Eugene Rutledge, Esquire, Rutledge & Associates, 1300 Brown Marx Tower, Birmingham, Alabama 35203, attorney for Plaintiffs; and on Harry L. Hopkins, Esquire, and John B. Tally, Jr., Esquire, Lange, Simpson, Robinson & Somerville, 1700 First Alabama Bank Building, Birmingham, Alabama 35203, attorneys for Defendant Companies, by placing same in the United States Mail, postage prepaid and properly addressed, on this, the 13th day of January, 1984.

/l.s./ Robert H. Stropp, Jr
Robert H. Stropp, Jr.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CALVIN L. PARKER, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	CIVIL ACTION NO.
	)	
CONNORS STEEL COMPANY, et al.,	)	CV 84-L-0030-S
	)	
	)	
Defendants.	)	

ANSWER OF DEFENDANT CONNORS STEEL COMPANY AND H. K. PORTER COMPANY, INC. TO FIRST AMENDED COMPLAINT

Defendants Connors Steel Company (herein "Connors") and H. K. Porter Company, Inc. (herein "Porter") answer the first amended complaint as follows:

FIRST DEFENSE

The complaint and each count thereof fails to state a claim upon which relief can be granted against Connors or Porter.

SECOND DEFENSE

With regard to the second cause of action, Connors and

Porter claim that the alleged violations of the September 1, 1980, July 1, 1982, and February 24, 1983 collective bargaining agreements are:

(a) barred by the applicable six-month statute of limitations;

(b) to the extent that the claimed violations are not now set for arbitration barred by the plaintiffs' failure to exhaust their contractual remedies under the final and binding grievance and arbitration provisions of said agreements;

(c) barred by pending arbitration being prosecuted by the United Steelworkers of America, AFL-CIO (herein "Steelworkers"), covering these alleged violations;

(d) barred by the doctrine of federal preemption since the conduct in question is subject to Section 8 and 9 of the National Labor Relations Act , particularly Section 8(a)(5), Section 8(d) and Section 9(a).

THIRD DEFENSE

With regard to the third cause of action, Connors and Porter assert the following:

(a) The action is barred by the doctrine of federal preemption since the conduct in question is subject to Section 8 of the National Labor Relations Act.

(b) The action is barred by the applicable federal and state statutes of limitations.

(c) The third cause of action in the first amended complaint fails to state a claim upon which relief can be granted against these defendants by failing to comply with Rule 9(b), Federal Rules of Civil Procedure.

FOURTH DEFENSE

With regard to the fourth cause of action, Connors and Porter assert the following:

(a) The action is barred by the doctrine of federal preemption since the conduct in question is subject to Section 8 of the National Labor Relations Act, particularly Section 8(a)(5) and Section 8(d), and subject to the exclusivity principle embodied in Section 9(a) of the National Labor Relations Act.

(b) The action is barred by the applicable six-months statute of limitations.

Defendants Connors and Porter further answer the allegations of plaintiffs' first amended complaint as follows:

1.

In answer to the allegations contained in paragraph 1 of the first amended complaint, Connors and Porter admit that the named plaintiffs were employees of Connors during the period from June 1, 19832 - August 31, 1983. Except as specifically admitted, Connors and Porter deny the remaining allegations in paragraph 1 of the first amended complaint.

2.

Connors and Porter admit the allegations contained in paragraph 2 of the first amended complaint.

3.

In answer to the allegations contained in paragraph 3 of the first amended complaint, defendants admit that Porter is a corporation under the laws of the State of Delaware and that it is qualified to do business in the State of Alabama. Except as specifically admitted, Connors and Porter deny the remaining

allegations in paragraph 3 of the first amended complaint.

4.

In answer to the allegations contained in paragraph 4 of the first amended complaint, Connors and Porter admit that Steelworkers is a labor organization with headquarters in Pittsburgh, Pennsylvania, and that Local Union No. 2250, located in Jefferson County, Alabama, is affiliated with the Steelworkers. Except as specifically admitted, Connors and Porter deny the remaining allegations contained in paragraph 4 of the first amended complaint.

5.

Connors and Porter admit the allegations contained in paragraph 5 of the first amended complaint.

6.

Connors and Porter admit the allegations contained in paragraph 6 of the first amended complaint.

7.

Connors and Porter admit the allegations contained in paragraph 7 of the first amended complaint.

8-12.

Paragraphs 8 through 12 of the first amended complaint do not allege any facts, but instead contain conclusory statements allegedly supporting class action claims. Connors and Porter deny that the prerequisites to a class action exist in this case and further deny that a class action is maintainable in this case.

13.

In answer to the allegations contained in paragraph 13 of the first amended complaint, Connors and Porter admit that Connors is a wholly-owned subsidiary of Porter and that Connors

had steel facilities at both Birmingham, Alabama and Huntington, West Virginia. Except as specifically admitted, Connors and Porter deny the remaining allegations contained in paragraph 13 of the first amended complaint.

14.

In answer to the allegations contained in paragraph 14 of the first amended complaint, Connors and Porter admit that Steelworkers is and has been during times material hereto the exclusive bargaining representative of certain of Connors' Birmingham, Alabama employees in the bargaining unit described in the September 1, 1980 collective bargaining agreement between Connors and Steelworkers. Connors and Porter also admit that Local Union No. 2250 is a local union chartered by the Steelworkers, that Tom Kimbrell and James E. Norman are, or were, the respective President and Vice President of Local Union No. 2250, and that Carl L. Statum is Sub-District Director of District No. 36. Connors and Porter further admit that the Steelworkers were the exclusive bargaining representative of certain bargaining unit employees at Connors' Huntington, West Virginia plant. Except as specifically admitted, Connors and Porter deny the remaining allegations contained in paragraph 14 of the first amended complaint.

15.

Connors and Porter admit the allegations contained in paragraph 15 of the first amended complaint.

16.

Connors and Porter admit the allegations contained in paragraph 16 of the first amended complaint.

17.

Connors and Porter admit the allegations contained in paragraph 17 of the first amended complaint.

18.

Connors and Porter admit the allegations contained in paragraph 18 of the first amended complaint.

19.

Connors and Porter admit the allegations contained in paragraph 19 of the first amended complaint.

20.

Connors and Porter deny the allegations contained in paragraph 20 of the first amended complaint except they admit that Connors and the Steelworkers through collective bargaining reached a Memorandum of Emergency Agreement to be effective July 1, 1982.

21.

Connors and Porter deny the allegations contained in paragraph 21 of the first amended complaint to the extent that same call for an answer by these defendants.

22.

In answer to the allegations contained in paragraph 22 of the first amended complaint, Connors and Porter admit that the July 1, 1982 Memorandum of Emergency Agreement was entered into by Connors and the Steelworkers. Connors and Porter deny the remaining allegations contained in paragraph 22 of the first amended complaint on the basis that the July 1, 1982 Memorandum of Emergency Agreement speaks for itself.

23.

Except to admit that Connors closed its Huntington, West Virginia facility on or about July 1, 1982, Connors and Porter deny the allegations contained in paragraph 23 of the first amended complaint.

24.

Except to admit that Connors and Steelworkers entered into a deferred compensation plan on January 21, 1983 through collective bargaining, which deferred compensation plan speaks for itself, Connors and Porter deny the allegations contained in paragraph 24 of the first amended complaint.

25.

In answer to the allegations contained in paragraph 25 of the first amended complaint, Connors and Porter admit that Connors sought further concessions from the bargaining representative of its Birmingham Works employees in an effort to keep the facility open. Except as specifically admitted, Connors and Porter deny the remaining allegations in paragraph 25 of the first amended complaint.

26.

In answer to the allegations contained in paragraph 26 of the first amended complaint, Connors and Porter admit that Connors commenced collective bargaining negotiations with the Steelworkers in February and that said collective bargaining resulted in a Memorandum of 1983 Emergency Agreement which became effective on February 24, 1983. Except as specifically admitted, Connors and Porter deny the remaining allegations contained in paragraph 26 of the first amended complaint.

27.

Connors and Porter deny the allegations contained in paragraph 27 of the first amended complaint.

28.

In answer to the allegations contained in paragraph 28 of the first amended complaint, Connors and Porter admit that Connors, as aforesaid, and the Steelworkers negotiated the February 24, 1983 Memorandum of 1983 Emergency Agreement. Connors and Porter deny the remaining allegations in paragraph 28 of the amended complaint.

29.

Connors and Porter deny the allegations contained in paragraph 29 of the first amended complaint.

30.

Connors and Porter deny the allegations contained in paragraph 30 of the first amended complaint.

31.

In answer to the allegations contained in paragraph 31 of the first amended complaint, Connors and Porter admit that Connors' Birmingham facility was closed on or about September 1, 1983 and that the closure occurred after the bargaining unit members twice rejected a proposed renewal collective bargaining agreement. Except as specifically admitted, Connors and Porter deny the remaining allegations contained in paragraph 31 of the first amended complaint.

32.

Connors and Porter deny the allegations contained in paragraph 32 of the first amended complaint.

33.

In answer to the allegations contained in paragraph 33 of the first amended complaint, Connors and Porter admit that there are pending grievances, but state affirmatively that all pending grievances are scheduled for arbitration. Except as specifically admitted, Connors and Porter deny the remaining allegations in paragraph 33 of the first amended complaint to the extent an answer is required of these defendants.

34.

Except as admitted in paragraph 33 above, and to the extent an answer is required of these defendants, Connors and Porter deny the allegations contained in paragraph 34 of the first amended complaint.

35.

Connors and Porter incorporate their answers to paragraph 1 through 34 as their answer to paragraph 35 of the first amended complaint.

36.

The allegations in paragraph 36 of the first amended complaint do not appear to relate to or require an answer from Connors or Porter.

37.

Connors and Porter incorporate their answers to paragraphs 1 through 34 as their answer to paragraph 37 of the first amended complaint.

38.

Connors and Porter deny the allegations contained in paragraph 38 of the first amended complaint.

39.

Connors and Porter deny the allegations contained in paragraph 39 of the first amended complaint.

40.

Connors and Porter deny the allegations contained in paragraph 40 of the first amended complaint.

41.

Connors and Porter deny the allegations contained in paragraph 41 of the first amended complaint.

42.

Connors and Porter incorporate their answers to paragraph 1 through 34 as their answer to paragraph 42 of the first amended complaint.

43.

Connors and Porter deny the allegations contained in paragraph 43(a)(b)(c)(d)(e)(f)(g)(h) and (i) of the first amended complaint.

44.

Connors and Porter deny the allegations contained in paragraph 44 of the first amended complaint.

45.

Connors and Porter deny the allegations contained in paragraph 45 of the first amended complaint.

46.

Connors and Porter deny the allegations contained in paragraph 46 of the first amended complaint.

WHEREFORE, defendants Connors and Porter pray that

the first amended complaint be dismissed and the costs and a reasonable attorney's fee be assessed against the plaintiffs.

/l.s./ Harry L. Hopkins
HARRY L. HOPKINS
JOHN B. TALLY, JR.
Attorney for Defendants
Connors Steel Company and
H. K. Porter Company, Inc.

OF COUNSEL:

LANGE, SIMPSON, ROBINSON & SOMERVILLE
1700 First Alabama Bank Building
Birmingham, Alabama 35203
Telephone: (205) 250-5000

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer of Defendants Connors Steel Company and H. K. Porter Company, Inc. to First Amended Complaint has been served upon all counsel of record in this action by placing a copy of same in the United States Mail, postage prepaid, and properly addressed, this the 27th day of the January, 1984.

/l.s./ H. Hopkins
Of Counsel

APPENDIX I

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED
87 Aug-5 PM4:05
U.S. DISTRICT COURT
N.D. OF ALABAMA
C.T. CLIVER, CLERK

CALVIN L. PARKER, et al,	)	
	)	
Plaintiffs,	)	CASE NO.
	)	
v.	)	84-L-0030-S
	)	
CONNORS STEEL COMPANY, et al,	)	
	)	
	)	
Defendants.	)	

MOTION TO ALTER, VACATE OR AMEND THE JUDGMENT

Come now the plaintiffs and move this Honorable Court to amend, alter or vacate the final judgment entered in this case on July 31, 1987 and as grounds therefor show unto the Court as follows:

1. The judgment is contrary to the facts and the law in the case.

2. Summary judgment is not due to be granted as there are a number of genuine issues as to a number of material facts in the case.

3. The judgment is against the great weight of the evidence and contrary to the law applicable to the case.

4. The judgment should be vacated and set aside and the Court should disqualify itself under the requirements of 28 U.S.C. Section 455 and return this case to the clerk for reassignment to another judge. The judgment, opinion and order are, based on the admission of the Court as stated
in the Memorandum of Opinion in the footnote on page 5, principally the result of the work of the Court's law clerk, William G. Somerville, III. William G. Somerville, III, is the son of William G. Somerville, Jr. who is one of the principal partners in the Birmingham, Alabama law firm of Lange, Simpson, Robinson & Somerville, which firm is the lead counsel for the defendants, Connors Steel Company and H. K. Porter Company, Inc. (See affidavit of W. Eugene Rutledge attached.) W. Eugene Rutledge, the lead attorney for the plaintiffs was not aware that the Court's law clerk was the sone of said William G. Somerville, Jr., a principal partner in the Lange, Simpson, Robinson & Somerville, or of the role the said law clerk had been assigned by the Court and had actually played in the formulation of the judgment, opinion and order until the publication of the Court's opinion which contained the following, above-referenced, footnote:

> "More than two years ago the Court announced its tentative opinion that defendants were entitled to summary judgment but deferred to the request of plaintiffs' counsel that action be withheld pending the completion of discovery, which proved to be wide-sweeping. **For the formulation of this opinion, the Court is indebted to its Law Clerk, William G. Somerville, III, for his careful analysis of the massive discovery materials and his countless discussions with the Court** as to how the law should be

> applied to the material facts as to which there is no genuine issue." (Memorandum of Opinion p. 5)[Emphasis Supplied]

The above footnote makes clear the extensive participation and substantive contributions of the law clerk to the decision of the Court as well as the formulation of the opinion. The participation was critical in that the judgment, opinion and order of the Court disposes of the case on summary judgment and it was the law clerk who reviewed the thousands of pages of deposition testimony and reviewed the hundreds of documents which are before the Court in this case. Moreover, the Court has clearly indicated in the above footnote that it was influenced by the opinions of the law clerk as to the applicable law as expressed in discussions with the Court as to the proper application of the law to the facts as determined by the law clerk from his review of the great mass of evidence in this case. Moreover, counsel for all parties met with the said law clerk at the request of the law clerk who stated he was carrying out desires of the Court to discuss the issues in the case. (See affidavit of Clyde E. Riley attached.) Any report of such discussions to the Court was made solely by the law clerk. It is, therefore, clear that the law clerk to the Court, William G. Somerville, III, played a very substantive role and was actually the only conduit through which the Court was aware of the substantive aspects of the evidence in the case and the opinions and views of counsel as expressed to the law clerk in interviews with the law clerk separate from the Court. The father and son relationship between one of the principal partners of the firm representing two of the three principal defendants in this case and the said law clerk, William G. Somerville, III, clearly requires the application of 28 U.S.C. Section 455 (a) which

reads as follows:

> Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

In **Hall v. Small Business Administration,** 695 F. 2d 175 (5th Cir. 1983) the Court held that a magistrate's disqualification was required under 28 U.S.C. Section 455 where the magistrate's law clerk was to be employed in the future by counsel representing one of the parties in a proceeding before the magistrate unless the magistrate isolated the law clerk from all knowledge of and participation in the case immediately after employment interviews began. The plaintiffs are of the opinion that the rationale of the disqualification cases under Section 455, for example, **Hall v. Small Business Administration** applies to this case in which the law clerk is the son of one of the principal partners of the counsel for two of the parties in the case.

5. Contemporaneously with the filing of this motion to alter, vacate or amend the Court's July 31, 1987 judgment, the plaintiffs are filing with the Court a motion for the Court to recuse itself from this matter. The plaintiffs incorporate herein the matters raised by the recusal motion as if fully set out herein.

WHEREFORE, THE PREMISES CONSIDERED, the plaintiffs respectfully request that the judgment, opinion and order filed on July 31, 1987, be withdrawn and that the Court disqualify itself and return this case to the clerk for reassignment to another judge for decision and order.

RESPECTFULLY SUBMITTED,

/l.s/ W. E. Rutledge
W. Eugene Rutledge, Attorney for Plaintiffs

OF COUNSEL:
RUTLEDGE & KELLY, P.C.
1300 Brown Marx Tower
Birmingham, Alabama 35203
Telephone: (205) 322-8761

CERTIFICATE OF SERVICE

I do hereby certify that I have mailed a copy of the foregoing to Harry L. Hopkins, Esq., LANGE, SIMPSON, ROBINSON & SOMERVILLE, 1700 First Alabama Bank Building, Birmingham, Alabama 35203 and Jerome A. Cooper, COOPER, MITCH & CRAWFORD, Suite 201, 409 N. 21st Street, Birmingham, Alabama 35203 on this the 5th day of August, 1987.

/l.s./ W. Eugene Rutledge
Of Counsel

C: 2027

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CALVIN L. PARKER, et al,	)	
	)	
Plaintiffs,	)	CASE NO.
	)	
v.	)	84-L-0030-S
	)	
CONNORS STEEL COMPANY, et al,	)	
	)	
	)	
Defendants.	)	

AFFIDAVIT OF W. EUGENE RUTLEDGE

STATE OF ALABAMA)

JEFFERSON COUNTY)

Personally appeared before me, the undersigned notary public in and for the state of Alabama at large, W. Eugene Rutledge, who is known to me, and upon oath deposes and says as follows:

My name is W. Eugene Rutledge and I am an attorney at law practicing in Birmingham, Alabama. I am the lead counsel for the plaintiffs in this case.

On August 3, 1987 I received in the mail a copy of the judgment, order and Memorandum of Opinion signed by United States District Court Judge Seybourn H. Lynne in this case, a copy

of which is attached hereto. I read the Memorandum of Opinion, including the footnote located on page 5 of the Memorandum of Opinion which reads as follows:

> "More than two years ago the Court announced its tentative opinion that defendants were entitled to summary judgment but deferred to the request of plaintiffs' counsel that action be withheld pending the completion of discovery, which proved to be wide-sweeping. **For the formulation of this opinion, the Court is indebted to its Law Clerk, William G. Somerville, III, for his careful analysis of the massive discovery materials and his countless discussions with the Court** as to how the law should be applied to the material facts as to which there is no genuine issue." (Memorandum of Opinion p. 5)[Emphasis Supplied]

I noticed the name of the law clerk to Judge Lynne to be similar to that of Bill Somerville, one of the principal partners of the firm of Lange, Simpson, Robinson & Somerville. I checked the Martindale-Hubbell law directory and determined that Bill Somerville's name was in fact William G. Somerville, Jr. On Tuesday, August 4, 1987, I telephoned Mr. Harry Hopkins, the lead counsel for the defendants Connors Steel Company and H. K. Porter Company, Inc. who is also a partner in the law firm of Lange, Simpson, Robinson & Somerville. I inquired about William G. Somerville, III, being the son of William G. Somerville, Jr., and Mr. Hopkins confirmed that this was so. Mr. Hopkins stated that he had been aware for some time that Mr. Somerville, III was working on this case and that he was aware that William G. Somerville, III had requested counsel for all parties to meet with him privately

with regard to their positions in this case. Mr. Hopkins stated that, being aware that William G. Somerville, III was the son of his partner, William G. Somerville, Jr., he declined to participate in those discussions, though he did attend some discussions with Mr. Somerville, III, at which all parties were present by counsel, but merely sat and listened in silence to what was said. I informed Mr. Hopkins at that time that it would be necessary for me to file a motion for relief to set aside the judgment, order and opinion and to move to recuse Judge Seybourn H. Lynne from the case under the provisions of 28 U.S.C. Section 455.

/l.s./ W. E. Rutledge
W. Eugene Rutledge

Sworn to and subscribed before me this the 5th day of August, 1987.

/l.s./ Dawn C. Holloway
NOTARY PUBLIC

COMMISSION EXPIRES: 3/90

OF COUNSEL:
RUTLEDGE & KELLY, P.C.
1300 Brown Marx Tower
Birmingham, Alabama 35203
Telephone: (205) 322-8761

CERTIFICATE OF SERVICE

I do hereby certify that I have mailed a copy of the foregoing to Harry L. Hopkins, Esq., LANGE, SIMPSON, ROBINSON & SOMERVILLE, 1700 First Alabama Bank Building, Birmingham,

Alabama 35203 and Jerome A. Cooper, COOPER, MITCH & CRAWFORD, Suite 201, 409 N. 21st Street, Birmingham, Alabama 35203 on this the 5th day of August, 1987.

/l.s./ W. E. Rutledge
Of Counsel

C: 2028

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CALVIN L. PARKER, et al,	)	
	)	
Plaintiffs,	)	CASE NO.
	)	
v.	)	84-L-0030-S
	)	
CONNORS STEEL COMPANY, et al,	)	
	)	
Defendants.	)	

AFFIDAVIT OF CLYDE E. RILEY

STATE OF ALABAMA)

JEFFERSON COUNTY)

Personally appeared before me, the undersigned notary public in and for the state of Alabama at large, Clyde E. Riley, who is known to me, and upon oath deposes and says as follows:

1. My name is Clyde E. Riley. I am a lawyer practicing in Birmingham, Alabama. I was licensed in 1983. I am an associate of the firm of Rutledge & Kelly, P.C. For approximately the last three and one-half years I have been an attorney for the plaintiffs in the case of **Calvin Parker, et al v. Connors Steel Company, et al**, Case No. 84L-0030-S.

2. During the last weeks of May or first weeks of June I received a telephone call from an individual who identified himself as Judge Lynne's law clerk, Will Somerville. The law clerk

stated that he was reviewing the briefs and submissions of the parties with respect to the defendants' motions for summary judgment and that Judge Lynne had suggested that he, Mr. Somerville, contact the parties' attorneys independently and separately discuss with them their views and positions on the case. I questioned the prudence of independent, ex parte conversations concerning the case and I told Mr. Somerville that the case had been under submission for more than a year and that in any event I would have to review the file before I would be prepared to discuss the case. I requested that Mr. Somerville not conduct ex parte counsel interviews and that, if any oral review as to the parties' positions was necessary, that the review be held with all parties present. Mr. Somerville stated that he would seek approval from Judge Lynne for such a change in the planned interviews and call me back. At a later date, Mr. Somerville advised that a joint converence would be held and that he had four or five areas of concern with respect to the plaintiffs' case. Mr. Somerville identified these areas and requested that the plaintiffs be prepared to address these areas at the conference.

3. I began some preliminary research on Mr. Somerville's areas of concern. I do not recall the initial date of the joint conference but it was rescheduled once or twice due to counsel conflicts. The date of the meeting was finally set for June 23, 1987. Prior to that date I received several telephone calls from Mr. Somerville regarding my progress on his areas of concern. The telephone calls contained specific inquiries regarding specific aspects of the plaintiffs' claims. I have reviewed my file for my notes regarding these conversations but I have not been able to find my notes. I specifically recall a telephone call on the morning

of June 23, 1987 which was participated in by another associate of this firm, J. Michael Cooper. During the course of that conversation Mr. Somerville addressed the issue of preemption and Mr. Somerville identified several cases which he suggested plaintiffs' counsel review prior to the afternoon conference.

4. On June 23, 1987 the counsel for the parties in this case, Clyde E. Riley and J. Michael Cooper of Rutledge & Kelly, P.C. [attorneys for plaintiffs], Harry Hopkins of Lange, Simpson, Robinson & Somerville [H.K. Porter Company, Inc. and Connors Steel Company] and Jerome Cooper of Cooper, Mitch & Crawford [United Steelworkers of America] met with Will Somerville and discussed the respective evidence and law of this case. During the course of the conference, Mr. Somerville discussed with counsel for all parties the facts of the case and the relative positions taken by the parties.

5. A week or ten days following the June 23, 1987 conference I saw James Nolan, one of the attorneys for Connors Steel Company and H. K. Porter Company, Inc., while walking downtown to lunch. I informally inquired of Mr. Nolan as to his absence from the conference. In this conversation Mr. Nolan and I discussed the fact that the motions for summary judgment had been under submission to the Court since January of 1986 and we discussed the June 23, 1987 conference with Mr. Somerville. During the course of this conversation Mr. Noland made a statement in passing which caused me to associate the last name of Judge Lynne's law clerk, "Somerville", to the Somerville name of Lange, Simpson, Robinson & Somerville. However, I had no idea that Will Somerville was William G. Somerville, III, son of William G. Somerville, Jr., partner in the firm of Lange, Simpson, Robinson &

Somerville. The firm is generally referred to as "Lange, Simpson" and, frankly, I never dreamed the son of one of the partners of the firm opposing us in the case would be working on this case for Judge Lynne, particularly since this relationship would have been known to Mr. Hopkins and he never brought this matter to my attention, or to my knowledge, the attention of the Court.

/l.s./ Clyde E. Riley
Clyde E. Riley

Sworn to and subscribed before me this the 5th day of August, 1987.

/l.s./ Dawn C. Holloway
NOTARY PUBLIC
COMMISSION EXPIRES: 3/90

OF COUNSEL:
RUTLEDGE & KELLY, P.C.
1300 Brown Marx Tower
Birmingham, Alabama 35203
Telephone: (205) 322-8761

CERTIFICATE OF SERVICE

I do hereby certify that I have mailed a copy of the foregoing to Harry L. Hopkins, Esq., LANGE, SIMPSON, ROBINSON & SOMERVILLE, 1700 First Alabama Bank Building, Birmingham, Alabama 35203 and Jerome A. Cooper, COOPER, MITCH & CRAWFORD, Suite 201, 409 N. 21st Street, Birmingham, Alabama 35203 on this the 5th day of August, 1987.

/l.s./ W. E. Rutledge
Of Counsel

C: 2014

APPENDIX J

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

FILED
87 Aug-5 PM4:05
U.S. DISTRICT COURT
N.D. OF ALABAMA
C.T. CLIVER, CLERK

CALVIN L. PARKER, et al,	)	
	)	
Plaintiffs,	)	CASE NO.
	)	
v.	)	84-L-0030-S
	)	
CONNORS STEEL COMPANY, et al,	)	
	)	
	)	
Defendants.	)	

ENTERED
Aug 31 1987

MOTION TO ALTER, VACATE OR AMEND THE JUDGMENT

Come now the plaintiffs and move this Honorable Court to amend, alter or vacate the final judgment entered in this case on July 31, 1987 and as grounds therefor show unto the Court as follows:

1. The judgment is contrary to the facts and the law in the case.

2. Summary judgment is not due to be granted as there are a number of genuine issues as to a number of material facts in the case.

3. The judgment is against the great weight of the evidence and contrary to the law applicable to the case.

4. The judgment should be vacated and set aside and the Court should disqualify itself under the requirements of 28 U.S.C. Section 455 and return this case to the clerk for reassignment to another judge. The judgment, opinion and order are, based on the admission of the Court as stated

OVERRULED

S/LYNNE 8-31-87
JUDGE Date

APPENDIX K

DEPOSITION EXCERPT OF KEITH R. GARRITY, CEO, H.K. PORTER COMPANY

Pages 69-70

MR. HOPKINS: We've handed Mr. Rutledge the October 29 letter.

MR. RUTLEDGE: Let's mark that as the next exhibit.

THE WITNESS: I believe the reason for that is Davison, who was President of H. K. Porter, of which Connors did not report to him, reported directly to E. P. Evans, and I wasn't going to become President until February or March, that's the reason that it is President-Elect. I think that's what that means.

BY MR. RUTLEDGE:

Q. Your counsel, Mr. Garrity, has been kind enough to provide me with a letter which I have marked as Garrity Deposition Exhibit 1. Let me show you that letter which is dated October 29, 1981, and appears to be an announcement by Mr. E.P. Evans from that date forward you will in charge of Connors Steel?

A. That is correct, sir, yes.

Q. Does that refresh your recollection that effective October 29, 1981, you were the man in charge of Connors Steel?

A. Based on this memorandum, that's absolutely right.

Pages 96-98

A. Yes, I guess it would be.

Q. Now, that says on the front of there 1982 — 1983, I'm sorry, in the right-hand column, and by there I'm still referring

to 12. Would that be something that comes out prior to January 1, '83? You were on the calendar year, weren't you?

A. Yes.

Q. Porter and Connors?

A. Right.

Q. So would that come out prior to '83?

A. Yes.

Q. About what time of the year '82 would Connors have submitted those documents to Porter?

A. Sometime late September, early October would be step one, of which this is part of step one roughly.

Q. Now, would there be a meeting at which the documents would have been presented and discussed at?

A. Not a specific meeting discussing that. There could have been —

Q. Would you or your staff have met with the Connors people to discuss this submission, 12?

A. Yes, I would imagine we met at an operational meeting and discussed operations and probably their first step, yeah.

Q. Now, would that operational meeting have been — would there have been an agenda — well, is in fact 10 the operational meeting at which Exhibit 12 was considered?

A. No, probably not. Because, this is, you see, the date of August and this would not have come until late September.

Q. Take a minute though and look at the substance of the agenda and see.

A. No, sir. This meeting would not have covered that.

Q. Would there be a document similar to 10 which

would cover the meeting at which 12 was presented and considered?

A. Could be. I would have to go look.

Q. Would that be the custom and practice —

A. Yes.

Q. — for there to be —

A. Yes.

Q. — a document such as 10?

A. Yes. And there may be one that says October, and it would then have October cover, step one, and then you cover as many other operation —

Q. Your best judgment would have been 12 would have been submitted sometime around October of 1982?

A. Yeah, late September, early October, somewhere in through there.

Q. Now, let me get this marked.

(Pause in the proceedings.)

Q. You had earlier referred to Mr. Graham Brown; is that correct?

A. Yes.

Q. As an independent consultant. Now, is this a person in whom you have some confidence, Mr. Brown?

A. Absolutely, yes, sir.

Q. Let me show you Garrity Deposition Exhibit 14, which is the cover letter of August 28, 1982, on this particular one I have here. To Mr. Eugene L. Hofmann forwarding a report prepared by Brown Products and Services. I don't know whether you actually saw that cover letter, but it is really the report that I'm interest in.

A. Yes, I do. I recall this, yes.

Q. Now, did you receive that report at or about the

Page 99

date of August 19, '82?

A. Sometime probably — early September I would guess, yeah.

Q. Did you read and review that report?

A. At the time I must have reviewed that report, yes.

Q. Now, do you recall attending any meetings with any person at which that report was discussed

A. I don't recall attending any meetings, but it could have been discussed with the Management Committee and with Graham Brown. Could very well.

Q. In your judgment, was there such discussions?

A. In my judgment, I believe there would be such discussion, yeah.

Q. Now, in your judgment, what would have been the description of the group that would have met or the persons that would have met to discuss it? Would it have been the Management Committee, the Board of Directors?

A. No, it would have been the Management Committee with Brown.

Q. Would there be any minutes or memoranda of such a meeting?

Page 110

Q. Other than you personally contacting Mr. Evans, was there some procedure — other than you contacting Mr. T. M.

Evans, was there some arrangement whereby somebody in the company sent certain documents to Mr. Evans periodically?

A. We sent him —

Q. What was that?

A. Financial statements.

Q. How frequently would these be sent to him?

A. Every month.

Q. What would those financial statements encompass?

A. It would encumber the P and L for the given month compared to what the budget was, compared to what it was last year.

Q. Would this be for each of the subsidiaries?

A. Yes.

Q. Rather than in a consolidated form?

A. In a consolidated form. In one book was a report on —

Q. I don't mean in one book. I mean would it be an H.K. Porter consolidated financial statement or would it be broken down by subsidiary?

A. Broken down by subjects.

Q. Was there anything else sent to Mr. Evans on a

Pages 120-121

purpose of our question here could we be fair to proceed on the theory that only 2 and 3 were meaningful scenarios?

A. Yes.

Q. Did Connors — excuse me, did Porter ever make

the decision to make the additional investments in Connors that Scenarios 2 and 3 in Mr. Brown's report required?

A. Yes. Scenario 2 , but not Scenario 3.

Q. Do you know of any record at Porter, any written record at Porter, evidencing the decision to make the investment provided in Scenario 2 in Connors?

A. No. The decision — no, not for the total of Scenario 2. That was not done. Only a part of it.

Q. Now, you have correctly stated that continuing with Scenario 1 means you had to close; is that correct?

A. Yes.

Q. How was it then, Mr. Garrity, assuming the correctness of Mr. Brown's report, that without making the investment required by at least Scenario 2, you proposed to keep Connors operating?

A. Because Scenario 2 at least got us in the black at some point.

Q. Yes, I understand that. My question is: Without making the investments called for in Scenario 2, how did you propose to keep Connors operating?

A. I couldn't have done it without —

Q. I thought I had understood you to say that there was no commitment by Porter, no decision by Porter to make the full investment called for by Scenario 2, is the —

A. That is correct.

Q.a So obviously then that investment was never made?

A. A million —

Q. The one called for in Scenario 2.

A. But the million four was made, and that we spent,

okay, in the first part. That was spent.

Q. Part of scenario —

MR. HOPKINS: What part are you referring to?

A. Page 22 in total if you followed it all the way through, the investment according to Graham would have been 10 million bucks.

Pages 123-128

in Connors, according to an independent consultant Porter had hired, that it couldn't keep Connors open?

A. I don't know if I said that or not. I don't know.

Q. Were copies of this independent study given to any of the auditors that are candidates that the Steelworkers sent to look at Connors' book?

A. I don't know what Mr. Smith picked up when he was here. I don't know if he had access or if this was given to him or not.

Q. I want to ask you about Garrity Deposition Exhibit 17, which is dated November 4, 1982, to A. D. Patton from you it appears to be and ask if in fact you prepared that.

A. I did.

Q. Now, were you aware of the negotiations that had taken place between the Steelworkers and Connors regarding a wage and benefit concession in 1982?

A. I was on the side of it, yes.

Q. Were you aware of the representations that were being made by Porter to the Union — by Porter and Connors to the Union — regarding the necessity for those wage and benefits

concessions?

A. I think — yeah, yes.

Q. Let me, for example, show you, for example, a document which is marked as Plaintiff's Exhibit 5 to the deposition of Mr. Wagner, which we took earlier. I know you don't know anything about that deposition. I'm just saying that to identify it for the record.

A. Okay.

Q. And ask you to look at it and see whether or not you have ever seen that document.

A. Yes, I think I do remember seeing it.

Q. Did you see that document at or about the time that it is dated?

A. That I don't know.

Q. Would you have seen it, say, within a month or six weeks of its date?

A. I'm not sure. I don't know that.

Q. What did you understanding were the representations that Connors was making to the Steelworkers during March, April, May and June of 1982 with regard to the necessity for wage and benefit reductions?

A. What I saw was this was an opportunity at least to break even —

Q. Let me ask you, I'm asking you not what you saw but what you understood the representations that were being made to be.

MR. HOPKINS: Understood from whom? Would you clarify that?

BY MR. RUTLEDGE:

Q. Let me back up a minute. You were the President and Chief Executive Officer — excuse me, Chief Operating Officer of Porter during March, April, May and June of 1982; is that correct?

A. Yes.

Q. And the President and Chief Executive Officer had given you direct responsibility for Connors some months earlier than that; is that correct?

A. Yes.

Q. Did you know that representations were being made to the Steelworkers with regard to the necessity for wage an (sic) hour benefit concession?

A. Representations by our people to —

Q. That's right. By Connors.

A. Yes, I was aware that Mr. Hofmann —

Q. My question is: What did you understand those representations to consist of?

A. An overall reduction of some number that I don't know what it was that allowed us to get closer to a break even.

Q. Did you understand that during March, April, May and June of 1982 representatives of Connors were making representations to the United Steelworkers that unless these wage and benefit concessions were made, Connors would not be able to continue operating?

A. Yes, I believe that's a true statement, yes.

Q. Now, referring then back to Plaintiff's Exhibit —

well, let me ask you this. And did you know that during the time — let me try to start over again on this question. Did you know in March, April, May and June of 1982 that representations were being made by the United Steelworkers to its members that were employees of Connors —

A. Yes, I did.

Q. — consistent with the representations that had been made by Connors to the Steelworkers?

MR. SHULER: Object to the form.

THE WITNESS: What?

MR. SHULER: That's just for the record.

THE WITNESS: Oh, Okay.

Q. Sir?

A. Yes.

Q. I want you to read Exhibit 17 and tell me whether or not the statements made by you in there are true.

A. Yes, I believe they're true.

Q. Now, moving on. Now, Mr. Garrity, during the time between October 14, 1982, when you wrote Exhibit 15, and mid-year 1983, did you determine a minimum performance level which Porter was willing to accept Connors as a condition of keeping Connors operating?

A. No a specific number, no.

Q. Was there any discussion among the Porter executive officers known to you as to a minimum performance level that Porter would accept as a condition of keeping Connors operating?

A. Not that I recall.

Q. Have you ever had any discussion with Mr. T. M. Evans as to the minimum level that Mr. Evans would accept,

minimum performance level that Mr. Evans would accept, as a condition of keeping Connors operating?

A. I think the only discussion that I could recall is to get it to a break even and get it into a positive cash flow. Probably a number of telephone calls along those lines.

Q. All right. So would it be fair then to say that you had a conversation or conversations with Mr. Evans in which Mr. Evans stated that if Connors could achieve a break even position and a positive cash flow, that he would continue to operate?

A. He would —

Q. Or that he would not prevent Porter from continuing to operate?

A. I believe that's, yes.

Q. Do you know about when that was?

A. It would have to be late '82, early '83. Each month from there on. As we were showing some progress. Instead of losing a million eight, we were down to a million one, down to 900, down to 7, so we were having a track record that looked like it was going in the right direction, and he was willing to live with us on that basis that, A, they are improving.

Pages 138-144

A. I understand that, yes.

Q. I want you to tell me the history of that requirement, when it first came up, where it first came up, how it got into the picture. Are you with me now on that? Don't concern yourself with whether you know the answer. Do you know what I'm

asking?

A. I think I — can I restate your questions?

Q. Sure.

A. I think what you're trying to find out from me or us is that when did this 30 day provision, the date or dates, did it happen in early '81, did it happen in May of '83, that this became a condition of the plant remaining open? Is that what you're saying?

Q. There we go, that's right.

A. I don't know. I don't know when that became. I really don't.

Q. Do you —

THE WITNESS: Do you? I mean, I don't.

MR. HOPKINS: We've given everything we know about the —

BY MR. RUTLEDGE:

Q. Do you know why it became a condition of the plant remaining open?

A. Not for sure, but I think the reason is that —

Q. I mean, everybody, I'm sure, would like to have the right to cancel — to be the only one who can cancel any contract on 30 days' notice, but other than that general desire, do you know why this would become a condition of keeping the plant open?

A. Because if the thing wasn't going to turn like we believed that it was going to turn in the next few months, we really believed that by the end of 1983, we would at least be to a break even. We believed that. Hopefully, in 1984, we would have turned the corner using part of Scenario 2 that would put us in the black and we would be making money.

The Board and the rest were not totally convinced that we would be able to do that, and so the 30 days had to be something that we talked about probably at a Board level that said, you can continue, but if you continue losing 6 and 700 grand a month and you don't bring it back to a break even, we want the right to close the plant.

Q. Do you think then that it was something discussed at a Board meeting?

A. I think it maybe was, yeah.

Q. Do you have any judgment as to about when, which Board meeting that would have been?

A. Not without looking. I would have to go back and look.

Q. Certainly you keep minutes —

A. Yes.

Q. — of the Board of Directors' meetings?

A. Yes.

Q. And if this had been discussed at a Board of Directors meeting, it would be in the minutes?

A. I'm sure it would be.

MR. MONTCRIEF (sic): Off the record.

—

(Whereupon there was a discussion off the record)

BY MR. RUTLEDGE:

Q. Mr. Hopkins has suggested that it is not in the Board minutes and he's right, it's not in the ones he gave me.

A. Okay.

Q. So I'm still back at where I was a minute ago, which is, if it was discussed at the Board meeting, why isn't it in the

minutes?

A. And I'm not sure that it was. I'm saying it may have been, but I don't know that for a fact.

Q. Where was it discussed? Where did it come from? Where did it originate?

A. I don't know if it was me that said we were going to get that 30 days and if we don't we're going to close the goddamn operation. I might be the one that did that, me personally, and I don't know that.

Q. Do you think you were?

A. Maybe. Could be. That could have been just my decision that says we're going to get —

Q. Did you say we got these guys, I don't want to enter the contract anyway, and this is a good time to get this out of these guys, is that the way it came up?

A. Mr. Rutledge, I'm a people's man —

Q. I know that. I'm ashamed of even asking —

A. I would hope so.

Q. — the question.

A. Yes, I would hope that you wouldn't.

Q. I'm ashamed to even has asked. But I do need to know where this came from, if you can give me any help at all.

A. I can't.

Q. Well, why didn't Porter or Connors make known that condition at the time that it was asking for the '82 concession?

A. I don't know.

Q. Why did Porter generate that condition after it had already obtained a June '82 and February '83 concession?

A. I don't know the answer to that either.

Q. Referring to your July 29 letter which is 19, did you write this letter, or was that drafted for you by —

A. No, I can tell you that this part of that, I know that for a fact, this part here for sure I would have prepared for me that I would have signed or Norm Wagner or somebody. Yes. This would be mine.

Q. Let me ask you specifically then about Page 2 of your July 29 letter, Exhibit 19, and the item numbered —

A. 1.

Q. —1. Quotes, you asked what, quotes, benefit, close quotes, could there be in the Union's signing a contract which permits the company, and not the Union, to terminate upon notice, close quotes.

Now, you've given me your explanation as to why Porter wanted the right to terminate on 30 days' notice. Could you now give me the explanation of why Porter insisted that the Union not have a similar right to cancel on 30 days' notice?

A. Well, how could we as good businessmen —

Q. You're not — I assume that's a rhetorical question.

A. I'm trying to get to your answer.

Q. Really you're not supposed to be asking me a question.

A. No, I'm not asking you a question. But we as good businessmen committing a lot of big bucks to Connors that didn't have the cash, that came from the parent, invest those moneys in that plant and it doesn't turn around? and the Union says, we're going to walk out in 30 days. What are we left with? They haven't made the investment. The Company has. So why should they have that right?

Q. Is that —

A. Yeah.

Q. Is that your answer?

A. Yes, that is my answer.

Q. I assume Porter decided they shouldn't have that right; is that correct?

A. I guess, yes.

Q. This is the next sentence. Quotes, I assume you are referring to, quote, benefit, close quotes, to the employees. The answer is, of course, quite evident since the alternative to the employees would be no job at all, close quote.

Now, are you stating there that either the employees and the Union accept this condition or Connors will be closed and there will be no job? Is that what you meant by that sentence?

A. Yes. Yes, I did.

Q. The last page of that letter reads as follows, quotes, as I confirmed to you in my letter of July 21, time is of the essence in this matter.

Pages 200-201

at financial records?

A. No. I looked at what they lost bottom line.

Q. That's all you looked at?

A. Sure.

Q. Was bottom line?

A. What the hell —

Q. Why they were losing the money?

A. If they're losing a million one and they go to a

million six next month, I don't have to spend a lot of time where that is.

Q. Was there a meeting in late 1981 attended by you at which persons with some association with Porter identified a number of operations within Porter that did not fit into the Porter long-range management planning and control system?

A. Yes.

Q. Was Connors one of those companies so identified?

A. Connors was not one of those companies so identified.

Q. What was the criteria used to identify the companies that would not fit into that long-range management planning and control system?

A. Ones that we believed might not have growth, had a potential to make large, large amounts of money. Delta Star, Alloy Metal Wire Works, Southern Textile Company, Tidewater Supply Company, that would take too much of management's time to go fix, those are the ones that we identified.

Q. Well, first, let me ask you, are there writings relating to the companies so identified?

A. I don't know if there is or not.

Q. Are there minutes of that meeting?

A. No. Here again, these were a number of meetings that we held as the Management Committee. Larry Moncrief, Emory, Dannible and I.

Q. Approximately when would those meetings have been held in '81?

A. I think whenever I came on board, and it must have been —

Q. - After October 29th of 1981?

A. It would have to be, I gather, because I wasn't here before, so it would have to be after that time. After — yeah, sometime in November, from November on, I would guess.

Q. Was Connors in financial trouble at that time?

Pages 227-230

statement on Page 2 and 3?

MR. RUTLEDGE: Yes.

A. To the best of my knowledge, they're all true, yes.

Q. Let me ask you to look at the first paragraph which reads as follows, quotes, the year 1983 was one of positive actions that prepared us for the challenge ahead. Did you write that?

A. Yes.

Q. The Company took many strategic steps by liquidating and/or selling businesses that did not fit our strategies for the mid-80's, close quotes.

Now, had your strategies for the mid-80's changed between the time that you had the meeting at some time after November of 1981, which you have told us about, at which companies that did not fit your strategies were identified and sold, identified as sale candidates?

A. No.

Q. Strategies were the same?

A. Same.

Q. Hadn't changed?

A. Yes.

Q. Now, is Connors one of the companies referred to

in this first paragraph?

A. No, sir, because it was not at the time in '81 identified as one of the companies that we were going to divest ourselves of.

Q. Well, is it one of the companies that was liquidated and/or sold during the year 1983?

A. That is correct, it was.

Q. Were there any other companies —

A. Yes, sir.

Q. Wait a minute. I got my part to play here, too, you know. Were there any other companies liquidated or sold during the year 1983 other than Connors?

A. Yes, sir, there was. The ones that we had identified before, the Tidewater Supply —

Q. Which companies other than — you just won't let me do my part. Which companies other than Connors —

A. I'll just answer your questions from now on.

Q. — were liquidated or sold during the year 1982?

A. Tidewater Supply Company and the Southern Textile Company.

Q. Now, is there anywhere in that report — which is Exhibit 25 to your deposition — where you indicate in any way or indicate in any way that you deemed is indicative that the sale and/or liquidation of Connors was on some basis and for some other reason than was true of the other two companies sold and liquidated during that period?

A. The reason it was liquidated was because we ended up —

Q. Please, sir, let me try again. Is there somewhere in

Exhibit 25 a distinction made between the reasons for selling Connors and the reasons for selling or liquidating the other two companies you mentioned?

A. I don't know. I don't think so. I don't know if there is or not.

Q. Well, take whatever time you need to satisfy yourself as to whether or not a distinction is made as to the reason for selling or liquidating Connors.

(Pause in the proceedings)

A. All right, so I don't waste your time, why don't you ask me the question again so I don't —

Q. The question is: Is there somewhere in that report a distinction made as to the reason for selling and/or liquidating Connors as to or as opposed to the reasons for selling and liquidating the other two companies that you mentioned were sold and liquidated during 1983?

A. No, sir, I don't believe there is.

Q. So that at least as far as one reading that report is concerned, Connors would fit into that first paragraph?

MR. SHULER: Object to the form.

A. No.

Q. I won't argue with you. Now —

A. Just because I say that it did not fit our strategies for the mid-80's, that doesn't have to mean that that's Connors Steel Company.

Q. I don't want to argue about that.

A. Okay.

Q. Now, the next paragraph reads, quotes, three years ago, we identified our strengths and weaknesses and made a conscious decision to improve our balance sheet. Cash became our prime objective and we attained our goal, close

Pages 232-234

Q. It was closed July 1, 1982, but what I'm asking you — I don't believe we have mentioned earlier today — is when did you sell it?

A. No, I don't really know when it was sold. Davison handled the sale.

MR. MONTCRIEF (sic): August.

A. Okay, August '82.

Q. And that would have been how long after you actually became President and Chief Operating Officer? You know, we've got the October 29, '81, thing stating you were President-Elect. When did you stop being that and start being the President, Chief Operating Officer?

A. Either February or March of the following year.

Q. So would it be fair to say that the Huntington Works were sold within five to six months of when you actually became Chief Operating Officer?

A. Yes.

Q. President, Chief Operating.

A. Yes.

Q. Now, were any businesses or parts of businesses sold by Connors — I mean, by Porter before the Huntington, West Virginia Works were closed? I mean, were sold?

MR. MONTCRIEF (sic): In '82?

A. He said before —

Q. Before.

MR. MONTCRIEF (sic): That could be '81.

MR. RUTLEDGE: I got you.

BY MR. RUTLEDGE:

Q. He's got a good point. Were any subsidiaries or portions thereof sold before the Connors, West Virginia Works after you became President and Chief Operating Officer?

A. Yeah, I believe, and again I am going to have to go back and look, but I would think that we sold off the Delta Star Division sometime in mid-'82 and we closed the Alloy Metal Wire Works —

Q. I'm just asking you now about sold. I'm going to get to the announcements in just a minute.

A. Okay. I am trying to think of what else was sold. That's all I remember right now.

Q. So if the West Virginia Works were not the first thing sold, they are the second?

A. Yeah, probably.

Q. After you took over?

A. Yes. And to make the record clear, they might have even been the first. Okay, I don't know that.

Q. They were the first or second thing you sold?

A. Yes.

Q. And actually, the announcement that it was going to be closed, the West Virginia Works, was made in March, was it not, to give some lead time?

A. Yeah, probably.

Q. Now, was the first closing announced after you became President, Chief Operating Officer the West Virginia Works of Connors? Was that the first announced closing?

A. I don't know that. I assume maybe that's the case.

Q. Do you know of anything else?

A. I don't know.

Q. Do you know of anything else you announced before that?

THE WITNESS: Was it announced before, say, March or April of '82?

MR. PATTON: Not to my knowledge.

A. Okay, then I guess the answer is no.

Q. Now, the sale or the closing of the Connors Works in Birmingham took place on August 31 or September 1, depending on how you term it, 1983.

Page 236

A. Southern Textile was smaller. I know that that wasn't much larger than 14 or 15 million in sales. I know that's smaller.

Q. So we have Connors sold, we have Tidewater sold, and we have Southern Textiles sold?

A. Right.

Q. By January 1, 1984; is that correct?

A. That is correct.

Q. Was there anything else sold by January 1, 1984?

A. Well, you wouldn't call it — well, if you look at the annual report, you will see that Fansteel, which was a large part of

H.K. Porter, was spun off in May of 1983. It became a separate company.

Q. Well, I see though you have here Fansteel's report on your sideboard, so it's still controlled by Mr. Evans, is it not?

A. Mr. Evans is a large shareholder of Fansteel, yes.

Q. Who owns the rest of it?

A. There are 25 or 2600 shareholders. They're on the New York Stock Exchange. That was spun off.

Pages 238-240

Q. I'm talking that sentence that you've got in that report and asking you how much of that increase you're talking about there.

A. We're talking about cash.

Q. Whatever you're talking about there came from the sale of the Connors Birmingham Works, and I include in that, of course, the inventory.

A. What I was trying to get at is how much of the income tax recovery was picked up in '83 as opposed to '82, and I don't — if I remember, it wasn't that much. Like maybe a hundred grand. I don't really know the answer to that.

Q. Can you give me any percentage?

A. 3, 4 million.

Q. Now, the next sentence in that paragraph says, this balance will — quotes, this balance will increase even further in 1984 when the proceeds from our tax loss carry forward and income from operations are realized, closed quotes.

Now, was any part of the tax loss carry-forward referred to

in that sentence to come from Connors?

A. I believe so, yes.

Q. Now, I'm trying to deal with the question. Quotes, our cash management strategy took many directions as we moved to control our financing requirements. This was primarily accomplished in the redeployment of resources through the divestiture of business no longer consistent with long-range corporate objectives. This program generated $13,500,000 in cash during 1983, close quotes.

Now, was any of that $13,500,000 in cash referred to in what I've just read to you related to Connors?

A. I'm sure some, yes.

Q. Now, Mr. Garrity, I want to — that's all I have on that. I want to ask you one other thing out of there. Look at Page 9. Let me ask you to look at where my thumb is on Page 9 under the heading discontinued segments which refers to — well, it states, quotes, the company finalized the disposition of three business segments during 1983. They included the Specialty Metals, Steel and Industrial Districts units, close quotes.

Now, is Connors one of those three business segments referred to in that statement?

A. Yes, sir.

Q. Did you write that particular paragraph?

A. No, sir.

Q. Is it true, what's stated there?

A. Yes, I assume it is true.

Q. What do you mean you assume?

A. Well, yes.

Q. All right, sir.

A. Can I go back and answer another question now that I see something that wasn't here before the question you asked me?

Q. Sure.

A. You wanted to try to —

Q. Although I warn you, sometimes that doesn't work out as well as you think it does, but go ahead.

A. I think I said that the realization might have been 4 or 4 1/2 million. That number may still be correct, but the income tax recovery for 1983 was $5.3 million, and I don't know how much of that is attributable to the Tidewater Supply Company.

Q. Were you aware that Porter had asked for concession from the Steelworkers at the

APPENDIX L

PORTER

H.K. PORTER COMPANY, INC.
EXECUTIVE OFFICE

TO:	E. L. Hofmann	DATE:	October 4, 1982
FROM:	K. R. Garrity	LOCATION:	Connors Steel
AT:	President's Office	SUBJECT:	October Forecast

PRIVATE & CONFIDENTIAL

Sales of $4.5 million and a loss of ($647,000) is not acceptable. This will not fly with T. M. Evans and I cannot disagree with him. We better come up with an alternative proposal before the Executive Committee Meeting.

If we take our September loss and proportionately spread it across the board with all employees what would their wages be in October? With 480 employees as of August 1, 1982 and we divided the loss arithmetically it would mean a reduction of wages of $1,354.17 for each employee, which would mean that some employees would receive (zero -0-) for month. Put your thinking cap on so we can save this operation.

/l.s./K. R. Garrity
K. R. Garrity

KRG:ls
cc: C. V. Emory
E. R. Clarke

DEPOSITION
EXHIBIT
15
GARRITY

APPENDIX M

DEPOSITION EXCERPT OF OLIVER MONTGOMERY, ACCOUNTANT FOR UNITED STATES STEELWORKERS

Pages 20-26

MR. COOPER: If you let him finish, I think you will get your answer.

MR. RUTLEDGE: Did you ask that Connors Steel give you a balance sheet prepared in accordance with Generally Accepted Accounting Principals?

A: Yes, I think we did.

Q: Did you ever get one?

A: No. They always came in this form with an explanation over the phone or something like that. We asked them what did this mean, what was in there and that type of thing, yes.

Q: So, you asked Connors Steel for a balance sheet prepared in accordance with Generally Accepted Accounting Principals but you never gone one; is that right?

A: Well, we probably didn't ask it in that sense. We probably asked them what is this item doing in here. Why don't you have, say, current liabilities, and what goes under that and under your long term liabilities and the normal tailend — the balance sheet and the stock you — the stockholders — the retained earnings.

The answer we got from that is because they were a subsidiary of H. K. Porter. And we have seen this happen too. They — their form of preparation of this was different than that the

normal form was. Since we had seen this many times before, you know, we began — we didn't like it. We questioned it.

But we had seen it before, and we have seen these deviations before, but we certainly asked them why don't you — what are they — why aren't you following the normal procedure, yes, yes.

Q: Please listen to my questions as carefully as you can.

Have you ever from the beginning of the world to date asked Connors Steel Company to give you a balance sheet prepared in accordance with the Generally Accepted Accounting Practices?

A: I would say generally speaking, yes. But not in that sense. Yes.

Q: What in the world does that mean? I mean, did you ask them to give you a balance sheet prepared in accordance with the Generally Accepted Accounting Principals or not?

A: Well, if you are talking to the financial officers of the companies and you, say, give me the normal statements prepared the normal way, he understands what you mean. The normal —

Q: Well, did you ask them that?

A: Yes, that is what I am telling you.

Q: Did they ever give you —

A: No. Every one that I saw came in generally —

Q: Did you ever ask them why won't you give me what I am asking you for, the terms of —

A: Yes, we did.

Q: What was the answer?

A: I said the nature of divisions and subsidiaries, when they break them up, sometimes they break them up this way. And

they said because they were a subsidiary. This is the way they would break the reports up.

Q: Did you ever ask anyone with Connors Steel to explain to you what was in the item shown as balance January 1, 1982 under Investment Account on the balance sheet?

A: Well, Mr. Smith didn't point out — you didn't ask him that. But in his meeting with Mr. Statum, and the local union people were there, that item was certainly covered. He did ask them what is in there, why is it there. Yes, yes.

Q: All right.

Do you recall what they said was in there?

A: I think they — some of what he said, you know, the — it represented the obligation to the parent, you know, the investment.

Q: Did you find out whether or not included in that item of twenty-two million dollars under Investment Account was what H. K. Porter had paid for Connors in the first place?

A: I think in some of our checking we came up with some rough figures.

Of course, I think they probably told us one thing, but we get — let me say the annual reports of Connors Steel and getting them for years and years. We get the quarterly reports. We get the — not Connors, but H. K. Porter's semi annual. And we follow the trend of all other divisions and subsidiaries.

So, I think in that sense in checking that one when they first bought — we might have even had some newspaper clippings. We have a clipping service that we refer back to. I think the company probably told us that we, being union people, was doing or best to check it out and see if this was close to, you know, what

was —

Q: Did you ever find out whether or not included in the items the balance of January 1, 1982 under Investment Account twenty-two million four hundred forty-two thousand eight hundred and four dollars was the original purchase price of Connors Steel by H. K. Porter?

A: If I can recall correctly — we researched the prices, but I don't think it really jived with that. I think it was sometime ago.

Q: Well, let me ask you this. Do you know whether or not the figure twenty-two million five hundred forty-two thousand eight hundred and four dollars shown under Investment Account, balance January 1, 1982, included the amount that H. K. Porter had originally paid for Connors?

A: To know exactly if that is the case, no. Because we were told that there were some other items probably included.

Q: Well, certainly you would agree, wouldn't you, that it would not be a generally accepted accounting practice for Connors to carry under the heading Investment Account the amount paid for it by H. K. Porter in the first place, would you?

A: Yes.

Q: Sir?

A: Yes.

Q: Yes, it would, or not, it wouldn't.

A: Would you repeat your question?

Q: Please read it back.

(Whereupon, the last question was read by the reporter.)

A: I would say yes, we pointed that out to them. As I say — that is about — at least ten or twelve of your questions center around this item, and we were requesting this. And in our mind,

what the hell could we do, we didn't like it.

Q: Look, all I want to know from you is this. And I apologize for my ineptiness in being about to ask it.

Have you ever found out from the beginning of the world until today whether or not the item of twenty-two million four hundred forty-two thousand eight hundred and four dollars shown under Investment Account balance January 1, 1982 includes the amount which H. K. Porter paid for Connors in the first place?

Pages 71-78

presently in existence reflecting your examination of the financial dealings between Porters and Connors which was originated prior to July 1, 1982?

A: I really can't say.

Q: All right.

A: I can't put my finger on it.

Q: All right.

Now, did you determine in your accounting work that there was a central accounting for H. K. Porter located at some-place other than Birmingham, Alabama?

A: I think we came to that assumption, yes, sir.

Q: Well, you came to that assumption or you came to know that for a fact?

A: Well, unless we went down and physically went checked it, we couldn't know it for a fact.

Q: Well, let me ask it this way. Did you or did you not find out whether or not H. K. Porter maintained a central accounting system which included the Birmingham facility of Connors which

was operated from someplace other than Birmingham, Alabama?

A: In the sense when I talked to the financial officer, Mr. Fleshman I was — seems as though I was — when I called him, I was put in contact a H. K. Porter official. So, I assume that was true.

Q: Do you not even know whether or not H. K. Porter maintained a central accounting office with accounts for Connors?

A: Any understanding was that they had — yeah, they had a centralized accounting system, I think we were told that.

Q: Did it have a centralized accounting office?

A: That I don't know whether or not they had centralized accounting office.

Q: Did they have a central accounting officer?

A: They had one accounting officer that we were told to call and address to.

Q: Did they have — did Connors' accounting system operate under the control of a Porter accounting officer?

A: Being the parent, yes.

Q: All right.

Who was that officer?

A: I don't have — I think Mr. Fleshman or Mr. Hoffman.

Q: Sir?

A: Mr. Fleshman or Hoffman, one of the two people.

Q: Well, they were here in Birmingham, those two men, Hoffman and Fleshman?

A: Well, let's see.

MR. COOPER: Do you mean they had been here on occasion or that their office was here?

MR. RUTLEDGE: I don't know. I'm trying to find out.

MR. COOPER: Well, your question is — he can't answer

because it's so ambiguous.

THE WITNESS: Right. The people who we were told to call or contact, I think they were in Pittsburg.

MR. RUTLEDGE: And that is the home office?

A: That is H. K. Porter's home office. That is right.

Q: So, you found out, did you not, that H. K. Porter received all of Connors' funds and accounting for it in Pittsburg?

A: I don't think I understand your question.

Q: Did you or did you not find out that all of Connors' funds, all of the funds attributed to Connors in fact went into Porter in Pittsburg and were accounted for from that location?

A: In that sense, no.

I knew they were a parent company and I know the relationship that, you know, they are controlling.

Q: Did you find out for example that payroll came out of Pittsburg for the Connors plant?

A: I think one of the payroll reports or something possibly showed that, yes.

Q: Did you find out that the invoices for Connors were paid out of Pittsburg?

A: Possibly, yes.

Q: Well, I mean, did you or didn't you?

A: Well, in our type of analysis, we didn't think, you know, that — we weren't as general —

Q: Sir, I just want to know —

A: We weren't — as Jim pointed out, we were not in that vein.

Q: All I want to know is whether or not you found out that the invoices were paid out of Pittsburg or not?

A: I can't say for sure.

I mean, we looked at it. But it didn't make any difference to us. It was a part of the subsidiary of a parent. We were looking at certain other things.

Q: Did you find out whether or not the general ledger for Connors was maintained in Pittsburg?

A: I think the CPA firm did that, yes.

Q: In Pittsburg?

A: And I think that — I think in our interrogation meeting when Mr. Smith was there when the company first came in, these are the kinds of questions that he asked them, you know, to get assurances on.

Q: Did you find out that the allocation of Connors funds to different accounting entries were made in Pittsburg?

A: I think that part we were told, yes.

Q: Now, did you ever visit H. K. Porter's office in Pittsburg — you, Mr. Oliver Montgomery?

A: I possibly went up there once or twice, I think.

Q: Well, I mean, did you or didn't your?

A: Yes, I went there.

Q: How many times?

A: I would say about twice I was up there.

Q: All right.

Would you tell us what you did when you went there?

A: I didn't do much of anything. A couple — one time I went, I didn't get to see the individual that I wanted. The next time, I think, I got a question answered or something like that.

Q: Have you ever examined any of the original books or records from which the summaries that were brought to the first

meeting were made up?

A: Did you read my report?

Q: I didn't ask you that, Mr. Montgomery. I asked ;you a very simple question.

Would you read it back to him, please, Mr. Foshee.

(Whereupon, the last question was read by the reporter.)

A: No, I did not look at any of the ledgers or things like that, no.

Q: Did you ever look between July 1, 1982 and March 31, 1983 at any of the original books and records of Connors or H. K. Porter?

A. No.

Q: All right.

Did anyone working under your direction or control in the time frame July 1, 1982 to March 31, 1983 look at any of the original books and records of Connors or H. K. Porter?

A: Not to my knowledge, no. That was the nature of our report.

The reason I asked you have you read my report, my report looking at the numbers as Mr. Smith told you, and I'm telling you again, we asked for certain documents, certain records in a certain form. And I spelled that out to the local negotiators what we received and the methods we go by in terms of trying to verify the accuracy. That is why you see that MA one hundred, MA one thousand there. If we in our interrogation with the companies feel that, you know, that something — you know, is out of order, we, as Mr. Smith said, we ask for the right to go and look at the books then.

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A: To the best of our ability, yes.

Q: Did you think that Connors' performance in 1981 justified the union making concessions to Connors?

A: I wasn't at the bargaining table. I told you I was a numbers person.

Q: So, you would have no opinion on that?

A: I expressed no opinion on it.

Q: Well, do you have one?

A: Do I have one now or did I have one then?

Q: Yes. Do you think Connors' 1981 performance justifies concessions by the United Steel Workers?

A: The 191 performance?

Q: Yes.

A: Definitely now.

Q: All right.

Now, on the 10-K's that you have referred to and the 10-Q's and — you are talking about the filing with the Exchange and Security Commission; is that correct?

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them in.

Q: All right.

So, you don't know; is that right?

A: Well, it wasn't deemed necessary, that is all I can say.

Q: So, you didn't send them in because you didn't deem it necessary; is that correct?

A: That is possible, yes.

Q: What was it that happened after the second concession agreement that made you deem it necessary to send the auditors in?

A: It wasn't me deeming it necessary, it was those in authority deeming it necessary.

Q: All right.

What was it that happened after the second concession agreement that made those in authority deem it necessary to send the CPA's in?

A: Well, they would have to answer that. I can't answer that. I can give you my opinion as to why they sent them.

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A: Certainly.

It was classified as a mini-mill at a point in time, yes. One of the first and original mini-mills.

Q: Was it classified as a mini-mill in 1981 and 1982?

A: :Yes.

And as Mr. Smith pointed out, one of the first. And they were going obsolete, you know, in terms of competing with Chappelle and the one in Texas and — you know, yes, they were one of the original mini-mills.

Q: Obsolete? Don't you know twelve million dollars was invested in 1980, did you know that?

A: We investigated — we always investigate the capital investment to protect our numbers. We want to know what you are going to — these questions were asked in the original meeting

with —

Q: Did you know that twelve million dollars was invested in 1890?

APPENDIX N

DEPOSITION EXCERPT OF ANDREW PATTON, OPERATIONS VICE PRESIDENT, CONNORS STEEL COMPANY

Pages 8-10

Q: So you were involved with both works, the Birmingham Works and the Huntington Works?

A: I had the title of Vice-President of Operations of both works. However, I was told to direct all my efforts to the problems that we were sustaining at the Birmingham plant and so I located in Birmingham.

Q: Who told you that?

A: Mr. Mueller, the President.

Q: Now, was your move from Cyclops to Connors a voluntary one on your part?

A: :Yes.

Q: You weren't asked by Cyclops to relocate or anything?

A: Absolutely not. I was Vice President of Operations.

Q: Now, what were you told or what -- well, I will say what were you told by persons at Connors with the apparent authority to tell you were the problems that were being experienced at the Birmingham Works of Connors?

A: Huntington Works.

Q: '79.

A: Huntington.

MR. HOPKINS: Could we go off the record a moment.

- - - - -

(Whereupon, there was a discussion off the record.)

- - - - -

BY MR. RUTLEDGE:

Q: You said Birmingham. Did you mean Huntington?

A: Yes. All my efforts was directed to Huntington.

MR. MONTCRIEF: You said Birmingham.

A: I'm sorry, all of them was directed to —

Q: Don't worry. I assure you, five years from now no one will even remember.

MR. SHULER: Did that mean you relocated up to Huntington and not Birmingham?

THE WITNESS: Absolutely. I'm sorry.

BY MR. RUTLEDGE:

Q: What were you told by whoever told you at Connors — I assume Mr. Mueller?

A: Yes. I worked for Mr. Mueller directly.

Q: What did he tell you the problems were at Huntington?

A: We had many problems, from operations, and we were losing money, and he wanted me to get into it and see if there was anything we could possibly do to continue the operations of the plant because we had a lot of problems.

Q: Was he any more definite as to the nature of the problems than what you just said?

A: Productivity was a big problem in Huntington. We had a lot of trouble.

Q: What did he tell you was the problems?

A: Focus on production and see if we can improve productivity.

Q: Did he cite productivity problems in terms of inadequate equipment or poor performance by the men or what did he tell you he perceived the productivity problem to be?

A: I think if he really knew what the problems were, Mr. Rutledge, I don't think they would have hired me. He knew there were problems. We had some new equipment, we had some old equipment, but he felt he needed somebody with operating experience to go in and help him. He was not an operating man.

Q: Can you tell me any more about what the problems were represented to you to be at the Huntington plant when you took this employment in 1979?

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Q: The goals were not achieved?

A: Yes.

Q: And you feel pretty sure about that, do you?

A: :Yes. To the best of my recollection, yes.

Q: I believe you've told us earlier that the market didn't turn around; is that right?

A: That's absolutely right.

Q: Did there come a time when an announcement was made that Connors would close the Huntington, West Virginia Works?

A: Yes, sir.

Q: When was that announcement made?

A: I can be specific on that because I put the announcement out. It was announced on May 17th.

Q: Of?

A: 1982.

Q: Now, prior to the time that that closing was announced, did you have any meetings with the Steelworkers — and by that I mean the United Steelworkers of America — regarding the possibility of closing the plant? And I mean by that to give you a time frame, after the renegotiated contract had been signed and before the May 17, 1982, announcement.

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A: December of 1981?

Q: Yes. Is there something specific about that?

A: Not that I know of. That doesn't strike any bell with me, December, 1981.

Q: Well, you said that you and Mr. Garrity had discussed losing money, Birmingham Works losing money. Do you remember that?

A: In '82, yes.

Q: When did you understand that the Birmingham Works had started to lose money?

A: I would say they were losing significant money starting in'82.

Q: Do you remember when?

A: I would say starting from the beginning of the year. I'm not sure of that. I believe in '82, Mr. Rutledge. I thought it was '82 because we met with the Union. Birmingham met with the Union in June of '82 and requested concessions.

Q: Now, you had access to the financial records of the Birmingham Works prior to becoming Executive Vice-President,

did you not?

A: They were available, yes, and I checked them with the financial people.

Q: Did you look at them?

Pages 83-84

Q: I'm not asking you that. I'm really asking you a pretty definite thing.

A: Yeah.

Q: Would you say if it had been charted, that it would be an up line on the chart?

A: Well —

Q: From the time you put this program in.

A: It would be maybe one month it was up and the next month it was down, but overall, there might be some improvement. I mean, unless I have a chart —

Q: Let me just ask you this. Have you ever represented to anybody that there was a steady improvement in the reduction of manhours per ton?

A: I may have. I may have.

Q: Now, Mr. Patton, when you were made Executive Vice-President in April of 1982, did you then begin to spend more time in Birmingham?

A: Yes, sir, I did. I had an apartment in Birmingham.

Q: When did you really change your schedule? Was it sometime before or after that or what?

A: Before that. Before that. Early '82.

Q: Early '82?

A: I would say so, yes.

Q: About what month in early '82?

A: Early would be January.

Q: So from January on, would it be fair to say that the bulk of your time was spent in Birmingham as opposed to Huntington?

A: I maintained an apartment in both Birmingham and Huntington, but I spent more time in Birmingham in '82 that I ever did before.

Q: Well, did you spend more time in Birmingham from January of '82 on than you spent in Huntington?

A: No. I spent more time in Huntington.

Q: When you were not in Huntington, who was performing the work in Huntington that you did perform when you were there?

A: The Works Manager, Bob Bunting.

Q: Bob who?

A: Bunting, B-U-N-T-I-N-G, the Works Manager.

Q: Did you tell Mr. Bunting sometime prior to April 17, 1982, that you were going to close the —

A: Prior to when, May 17?

Q: May 17, 1982, that you were going to close the Huntington Works?

APPENDIX O

DEPOSITION EXCERPT OF JIM SMITH, UNITED STATES STEELWORKERS INTERNATIONAL UNION REPRESENTATIVE IN CHARGE OF CONNORS STEEL CO. NEGOTIATIONS

Page 13

A: I was not aware of that. And to the best of my knowledge, none of us in the Research Department were aware that anything was going on there until after the decisions by the district director and the local union there had been made.

Q: All right, sir.

Let me ask you —

A: As I say, they — if I could, I would like to —

Q: Sure, go ahead.

A: During that period, on some occasions, a director would simply arrange for an outside accounting firm, and he could do that through our International treasurer's office without coming through my office to do it. So, in some cases, outside accountants were used by that procedure, and in some cases they asked us for help. But we were overloaded and we would send it to the treasurer's office to hire an accounting firm.

Pages 14-16

Q: All right. Let me ask you this.

Under the United Steel Workers constitution and rules which were in effect in the years 1981, '82 and '83, was the ultimate

decision as to whether or not a labor agreement was to be approved, whether tri-annual contract or some interim agreement with the local union, with the district director, within the International headquarters or with some other entity?

A: Well, legally, of course, our position has always been that any contract requires the signature of the International president to be effective as binding upon our union. As a practical matter, the normal procedure is that if a contract made with a single plant manager is approved by the membership involved by some ratification procedure and the district director recommends that contract, that has been the practical procedure that has been followed.

Now, in the earlier 1980's when companies began to come to us in substantial numbers asking for relief under an existing contract, asking that we renegotiate the terms of an existing contract, which had sometimes a significant amount of time left to run, we adopted then a policy that no such action would be taken without ratification by a majority vote of the membership covered by that contract.

Q: Is that in writing anywhere?

A: There was letters from the International president setting forth that — no. Wait a minute. The letters didn't spell that out. That was a matters that we — he told me what he wanted to do when directors brought the problems in. I told them, and that was the way we proceeded. That specific procedure was not spelled out in any of the letters, but it was a uniform practice that we felt as a matter of policy we should follow. And we did follow.

Q: How were the district directors advised of this? Would it be fair to say this was a change in policy?

A: No. We had not been confronted with the problem before. Normally —

Q: Well, then, how were the district directors advised of this policy?

A: They were advised by letter that before engaging in serious negotiations on these sort of subjects, that they should refer the matter to the Research Department or to an outside accounting firm to have a thorough investigation of the financial condition of that particular company.

And when they came to our office as ninety-five percent of the cases did, we would tell them then the practices, the procedures that the president wanted followed. And to the best of my knowledge, every one agreed with them. The five percent of the cases where they went simply to an outside accounting firm, if we heard about it or if they talked with any of the officers, I'm sure the treasurer's office advised them pretty much the same thing.

So, the word went out on an as needed basis.

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A: Not at all beyond what I told you that he said they were making — they were losing money, and they decided the best way to stop losing the money was to close the plant.

Q: Have you ever, up to and including today, learned what happened at Huntington relative to negotiations between Connors and the Steel Workers preceding the plant closing?

A: No details, no.

I just know that there were some discussions. I don't know

the details of those discussions.

Q: Have you ever made any inquiry as to what happened?

A: No.

Q: Have you ever directed anyone to make any inquiry on your behalf as to what happened.

A: No.

APPENDIX P

DEPOSITION EXCERPT OF DEFENDANT CARL STATUM, THE UNITED STATES STEELWORKERS REPRESENTATIVE TO CONNORS STEEL

Pages 20-22

A: No, sir.

Q: Did you get copies of any quarterly reports or anything like that?

A: No, Mr. Rutledge, we have — maybe you are trying to know why I asked research to do something for me.

Right now I have got two contracts coming up that I have got to start negotiating. I will make a request to the research department to give me financial data on these companies if they have it, so when I get in the negotiations, I can look at a piece of paper and see what they made last year and the year before that. That is why I made the request.

But, normally I don't — I don't know until I make that request, and I only do that when the contract is about to expire.

Q: All right.

Now, what is the first time that you heard anything about Connors making a request for concessions at the Huntington, West Virginia plant?

A: I don't know that I ever heard that. I probably heard it after the fact that they had made them. But to be precise, for a year or month, I could not be.

Q: When is the first time that you ever heard anything about Connors or Porter wanting concessions at the Birmingham

Works?

Q: I believe Mr. Wagner called me sometime prior to us making that agreement, because it was June of '81 — no, wait a minute — '82, I'm sorry.

Q: Concession one agreement?

A: Right.

Q: July 1 of '82 was the effective date of —

A: Well, it was a month or two prior to that he called me and told me he and Mr. Patton wanted to meet me and discuss some matters. I said, sure, come on over.

We met and they told me then they were in bad shape and they were losing money rapidly and they had to have some concession or else they feared that the parent company was going to cut off their assistance to operate the Connors plant here in Birmingham.

Q: Well, what was the difference between what they said to you there in '82 and what they had said to you back in '77 about being fearful that Porter wouldn't let them operate then?

A: I would classify the difference as this had to be done immediately or the plant they felt like would be in serious jeopardy whether or not to even have a job. That never — in '77, the same fear was expressed and we went along with some lesser demands than we had on the table in '77.

Q: Well, did they make any representation to you, Mr. Wagner and Mr. Patton as to what the previous year's financial condition had been?

A: In '82?

agreement?

A. Nobody from the International Union had any input into this agreement.

Q. Why not?

A. Except Carl Statum. You have been over the advice and counsel I tried to seek with the Research Department. With that exception, nobody had any input in it except me.

Q. Well, anyway, Mr. Smith says, "You did an excellent job." Says, "However there are a few areas of concern that we would like to call to your attention. These areas are crucial. If you and your negotiating team did not intend to leave them out, it would be wise to make certain that they are covered before the document is signed."

A. And I had already signed the document at that time.

Q. Yes, sir. Whatever he got in that letter that he considered crucial, it was too late to put it in the document by the time you got the letter; is that right?

A. Yes, sir.

Q. And the items in Plaintiff's Exhibit 2 to your deposition were never put in the July 1, 1982, Memorandum of Agreement?

A. Well, I believe — no, sir. Not in this document, no, sir.

Q. Now did you agree with the letter of July 9, 1982, that you got from Mr. Smith insofar as paragraphs one and two on page two of that letter are concerned?

A. I did not agree with his interpretation of what the document said.

Q. All right. Let's see. Paragraph one, he says — and I am reading from page two of Plaintiff's Exhibit 2 to your deposition. "Paragraph one on page one suspends certain benefits which are not yet effective and restores them on August 28, 1983, unless a new agreement is reached before that date. However, item 8A through 8E on page seven" — and that's page seven of your Memorandum Agreement, right?

A. Yes, sir.

Pages 101-102

A: I may have or I may not. I don't recall.

Q: Let me tell you what figures I am talking about. Whether or not you ever saw any figures prepared by either Connors or the steel workers or anyone else for that matter which showed that based on projections if Connors got these wage and benefit concessions in the February 27th, 1983, Agreement that it could return to a break even point or profitability?

A: I don't recall seeing any figures that would do what you said they would do. During the course of conversations I had with Mr. Wagner, he told me that "if we can get these numbers down we have got a fighting chance. And we think if we can change product lines, if you guys will help us. If you folks will help us, we can bring these losses on down to a number where we will reach a break even and get profitable." But to say I saw figures that would project that, I don't think I ever did. I may have, but I don't recall.

Q: What led you to believe, Mr. Status, if anything, that

these concessions, these specific figures, would accomplish what Connors thought they would accomplish; i.e., a return to a break even or to profitability?

A: Well, what I believe, what led me to believe that was that I knew from conversations I had had with the steel companies, the big steel companies, was projecting an upturn in the economy. We knew it was — we thought it was at a low ebb. It had gotten worse and worse, and everybody was saying, "well, it's probably going to turn around." The President of the United States was saying that. And I don't know that I ever had that question in my mind that I believed it was going to do it. But I thought there was a chance to do it. And I really thought there was.

And I still thought they were because we brought — I remember by their concessions and what the Company was doing that brought the losses from January to a million, nine down to the numbers I had prior to closing to like one hundred and ninety thousand. The line was just coming right down. And I though we were on the road.

Pages 116-117

Q: (BY MR. RUTLEDGE) I am sorry, Mr. Statum.

A: Yeah, and I want to apologize to you for getting upset with you. But I am a human being like you are. And if I said anything to offend you, I apologize about it.

Q: Anything I did to contribute to it other than I do make those accusations, and I am sorry for the whole thing.

Now why did you not consult an accountant as to wether or not the figures contained in that February 27th, '83, Agreement

or concessions obtained in that would produce savings that would hopefully achieve the objective of making Connors break even or a profitable business?

A: Well, I don't feel like it was necessary.

Q: All right, sir. Why did you not consult Mr. Smith or Mr. Montgomery as to whether or not those figures would achieve that result?

A: I just didn't feel like it was necessary. I knew some were necessary because Mr. Smith had told me that they were in serious trouble.

Q: What effort, if any, did you make to determine — and I am speaking now in terms of actual dollars — why the original concessions had not achieved the desired break even or profitability?

A: Well, I knew that the other mini mills had been cutting prices, and I knew that their losses were even greater at this point than they were when we made Concession 1.

Q: Did you make any effort to determine the exact deductions that were being made by Connors Steel?

A: The deductions?

Q: That's right, from gross income or a total income to arrive at the figures they claim were losses?

A: We had a meeting with Mr. Smith and Mr. Montgomery in the city of Pittsburgh.

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A: Yeah. I see what it says.

Q: I said, did you get one?

A: I read that just now. I don't recall getting a telegram, but I am sure I did if the Local Committee did.

Q: Well, certainly if you had gotten such a telegram it would be somewhere in your files, wouldn't it?

A: I would think so, yes, sir. What I think the difference here is, Mr. Rutledge, if I can explain, that — I was in the city of Pittsburgh while this was going on. And they probably sent on overnight letter or telegram of some sort to the Local Union Committee, the negotiating committee, who are signatures to this document. But I don't recall getting a telegram.

Q: In the next paragraph, you say, "The International Union and you Local Committee believes the continued operation of Connors Steel will cease if some means of relief is not forthcoming in a very short period of time."

Pages 150-152

Q: Cussing them about — did they say about what?

A: About just the general situation that the state was there, that we gave concessions, the Company ain't making money, y'all ought not to have suggested we do that. The Committee, they had the run of the office, and they were concerned about that. And that was the whole purpose of that, and they didn't deserve to be criticized.

Q: All right, sir. Did you have a meeting at the Local with regard to Concession 2?

A: It seems to me like they told me they were going to be out of the Union hall for a day or two and have everybody come by and talk to them.

Q: Did you have a meeting?

A: A regular membership meeting?

Q: Yes, sir.

A: No, sir.

Q: Did you have requests to have a meeting?

A: I didn't.

Q: Did you hear from the officers of the Local whether or not they had had a request to have a meeting?

A: Seems to me Tom told me that he had a petition to have a meeting. Whether he had it or not, I don't know.

Q: Do you recall in February of 1983 what the requirements were to have a called meeting of Local 2250?

A: Well, the constitution provides.

Q: What does it say.

A: I can't recall. Essentially it says that upon request of ten or more members of a Local Union, the President will call a special meeting. And it goes on to say something about an agenda. Anyhow, when Tom talked to me about it, the written request he had he told me didn't meet the constitutional requirements. He wasn't going to call one. Whether he did or not, I don't know.

Q: Well, did you discuss with Mr. Kimbrell why he wouldn't call a meeting of the membership to have the membership discuss a matter such as this?

A: He told me he perceived that the people that had signed the letter, they just wanted to get him out there so they could cuss on him and beat up on him, and he wasn't going to put up with that.

Q: And so he wasn't going to have the meeting?

A: At that point he said he didn't intend on calling one.

Q: Did you ask him what the difference would be in having a meeting and being cussed and beaten up on as opposed to sitting out there all day so people could come in and do the same thing to him?

A: No.

Q: I was just curious as to if he said why he chose one over the other?

A: No. I understood that happened, and they had a fist fight out there. And that's what he was trying to avoid.

Page 160

A: I don't recall that. This is the 30 day written notice, and we perceived that — if we got an agreement, we didn't want to cancel it in 30 days. That was the — these are the three things there really in my judgment constituted a turn down by the employees whether there was the first one or last one or in between. I don't recall when I received this document.

Q: Let me ask you this: were there other provisions which the Company asked for besides these three which they eventually gave up?

A: I don't recall if there were or not, Mr. Rutledge.

MR. COOPER: You mean, other things that were given or that these three were given up?

MR. RUTLEDGE: No. It is clear these three items are what busted up the —

A: I believe that was really what the Company wanted.

Q: Well, isn't it true — what I am trying to get at is: Isn't

that true that that's what the Company started with and that's what the Company stayed with throughou the negotiations, those three items?

APPENDIX Q

MEMORANDUM OF EMERGENCY AGREEMENT

Settlement Agreement dated June, 1982 between Connors Steel Company and the United Steelworkers of America and its Local Union Number 2250.

Whereas the parties have been in negotiations for the purpose of effecting certain cost reductions and have reached certain understandings related thereto it is now therefore agreed to on behalf of Connors Steel Company by its undersigned authorized representatives and the United Steelworkers of America and its Local Union 2250 by its undersigned authorized representatives that:

1. Effective July 1, 1982 all negotiated benefits in the current Collective Bargaining Agreement not yet in effect, except those increases in the Minimum Pension Benefit Formula scheduled to become effective September 1, 1982 shall be suspended for the duration of the current Collective Bargaining Agreement; provided however that if the Company and Union have not reached agreement on the terms of a Collective Bargaining Agreement to be dated September 1, 1983 by 7:00 a.m. August 28, 1983, all benefits suspended by action of this paragraph shall become effective as of 7:00 a.m. August 28, 1983, the same as if they had not been suspended.

2. A study of the need for continuing the present manning levels of all plant jobs will be made jointly by a United Steelworkers of America Industrial Engineer and a Company Industrial Engineer. The parties agree that the joint findings of the two Industrial Engineers will be implemented immediately upon receipt of their report.

A. The company will grant one 70-80 Pension for each job eliminated and any employee whose job is eliminated as a result of this study will have the option to accept or reject a 70-80 Pension, provided the employee is qualified for such 70-80 Pension. **To be eligible for a 70-80 Pension under the terms of this agreement an employee must have 15 years of continuous service and (1) be between the ages of 55 and 62 (inclusive) with continuous service plus age equal to 70 or more; or (2) if less than 55 years of age his age and continuous service must equal 80 or more.** If the employee rejects the 70-80 Pension or is not qualified, then the affected employee shall exercise his or her rights under Section 8, Seniority, of the Collective Bargaining Agreement.

B. Employees whose jobs are affected as a result of the study referred to above and who are qualified for a 70-80 Pension shall have 15 days from the date the study is completed to exercise the option referred to above.

C. If an affected qualified employee elects not to accept a 70-80 Pension, then employees who suffer under some form of disability will be identified by a Joint Local Union Management Committee. Qualified employees in that group

will be considered, provided they elect to be considered, by the Joint Local Union Management Committee for the 70-80 Pension. Such election shall be exercised within 15 days after notification.

D. Any 70-80 Pensions remaining of the number originally allocated will be made available, on a seniority basis, to any qualified employees electing the same. Employees electing under this clause shall exercise this election within 15 days of notification. The number allocated shall not be more nor less than the number of persons displaced through application of this Paragraph 2.

3. The Company will apply the money saved as a result of the reductions in wages, etc., herein provided, to operating losses, working capital, new equipment, or any other areas that will improve the Company's competitive position at the Connors Birmingham Plant.

4. Suspended Benefits Recovery Program

A. "Suspended Benefits (sic) as used in this Agreement means the wages and benefits which have been deferred, postponed, delayed, reduced or affected by the provisions of Paragraphs 1 and 3 above.

B. Individual records of Suspended Benefits shall be maintained by the Company. By November 15, 1982 and thereafter within forty-five (45) days of the end of each fiscal quarter, the Company will provide each employee with a written

statement showing the amount and detail of his or her Suspended Benefits.

C. A Joint Labor and Management Committee will be formed immediately which will consider the manner and method of repayment of "Suspended Benefits". It shall be the responsibility of this Committee to determine any reopening provision to this Agreement, to consider shareholder equity and return, and establish a profit sharing or stock plan that will make employees whole and recognize in the plan there should be a reasonable return on investment to shareholders, after return to profitability.

The Committee shall complete its work within sixty (60) days from July 1, 1982 unless the parties mutually agree that more time is needed.

If the Committee cannot mutually agree to the items listed above then anytime after sixty (60) days from July 1,, 1982 either party can declare this Memorandum of Agreement null and void in its entirety, and the provisions encompassed in the present (1980) Collective Bargaining Agreement shall be immediately implemented.

5. The Company and the Union agree to a Labor Management Participation Team Experimental Program. The United Steelworkers of America will provide a program expert to assist the Company and local Union in organizing such a program for implementation.

6. The Company agrees to provide Quarterly and Annual Financial Reports to the International Union Research Department including confidential information as needed.

7. Equality of Sharing

A. The Company recognizes that to over-

come its financial difficulties cost saving sacrifices must be made with respect to all of its employees, including managerial, supervisory and non-represented workforce, hereinafter collectively called "non unit employees". Therefore, the Company has taken the following action:

1. The salary, wage and benefits of each non unit employee will be frozen at the amounts paid to him or her on July 1, 1982 and will not be increased by more than the amount of any increase paid to any individual unit employee during the term of the Agreement; normal promotions and demotions excepted.

2. No bonuses, production incentives excepted, will be paid to non unit employees during the term of the Agreement.

3. In order to achieve savings and bring the ratio of non unit employees to a more efficient level the Company agrees that it will reduce its non unit employees as rapidly as possible, and to the extent that the Company can, using as a criteria sound business judgments.

4. The Union shall have no voice in determining the manner or method of achieving reduced levels of employment of the non unit employees. The Company shall be solely responsible for deciding all such questions.

B. The above actions are in addition to the steps already taken by the Company to reduce costs in the non unit employees, these steps have included.

1. A reduction in the number of non unit employees by 12%.
2. A salary freeze effective May 1, 1982.
3. Furthermore salaried employees have not received C.O.L.A.

C. In administering this section the intent shall be to apply the wage and benefit reductions to all employees of Connors Steel Company in an equitable manner. To insure the accomplishment of these goals the Company agrees to reduce the non unit employees wages commensurate to the reduction taken by the employees covered by the Collective Bargaining Agreement. The Company shall target reductions in the wages, salaries and other benefits of the non unit employees of the plant, equal proportionally to the reductions made for the hourly work force, to be accomplished by August 1, 1982. The formula for this computation shall be the number of employees multiplied by the value per hour of the reductions in wages, salaries and other benefits, multiplied by 150 hours per month. Information confirming the equality of sharing of the non unit employees shall be made available to an official of the Union.

8. Benefit Suspension

A. Effective 7:00 a.m. July 1, 1983 each average hourly earnings shall be reduced 20%.

B. Effective for the calendar year 1982 the day after Thanksgiving will not be considered a holiday within the meaning of Section 6 of the 1980 Collective Bargaining Agreement.

C. Effective for the calendar year 1983 the following days will not be considered as holiday within the meaning of Section 6 of the 1980 Collective Bargaining Agreement:

George Washington's Birthday (third Monday in February), Memorial Day (last Monday in May); and Good Friday.

D. Effective for the calendar year 1983 vacation bonus will not be paid.

E. Effective for the calendar year 1983 vacations, regular and extended, will be shortened by one week.

This Agreement is subject to ratification by the membership of Local 2250 of the United Steelworkers of America and if so ratified shall become effective 7:00 a.m. July 1, 1983 and remain in effect until 7:00 a.m. August 28, 1983, unless terminated earlier under other provisions of this Agreement.

United Steelworkers of America
By

Connors Steel Company
By

_____ _____
President

_____ _____
Secretary

_____ _____
Treasurer

_____ _____
Vice President

District Director

International Representative

President, Local 2250

Vice President, Local 2250

Committeeman

Committeeman

Committeeman

Committeeman

APPENDIX R

U.S.C. 28 SECTION 455

Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where has has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

_____
District Director

_____
International Representative

_____
President, Local 2250

_____
Vice President, Local 2250

_____
Committeeman

_____
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_____
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(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person;

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

APPENDIX S

MEMORANDUM OF 1983 EMERGENCY AGREEMENT between the United Steelworkers of America and its Local 2250 and Connors Steel Company of Birmingham, Alabama.

The United Steelworkers of America, AFL-CIO ("the Union") and Connors Steel Company at its Birmingham Works ("the Company") are parties to a collective bargaining agreement dated September 1, 1980, as modified in certain respects by the Emergency Agreement dated July 1, 1982.

Whereas, the financial stability of the Company is in serious jeopardy and the Company and its employees are working jointly to preserve the continued operations; and

Whereas the Company is willing to distribute a substantial portion of its future profits to the employees as compensation for moderation in labor costs; and

Whereas, the employees are willing to take reductions in wages and other benefits.

NOW THEREFORE IT IS AGREED THAT:

I. The September 1, 1980 basic labor agreement shall continue in effect according to its original terms except as modified by the July 1, 1982 Emergency Agreement and the Emergency Agreement of 1983 dated February 24, 1983.

II. The Emergency Agreement of July 1, 1982 shall continue in effect according to its original terms and provisions except as such may be modified by this Emergency Agreement of 1983.

III. The terms and provisions of this Emergency Agreement of 1983 shall become effective February 27, 1983 and expire at 7:00 a.m. August 28, 1983, except that Item VII (Pay Back Plan) shall continue in effect, as long as Connors continues to operate, until all

affected employees have received out of future Company profits the full value of the wages and benefits lost as a result of the Emergency Agreement of 1983; provided however that the parties have not mutually agreed otherwise.

IV. Bargaining Unit employees agree to concessions in the wages and benefits payable under the September 1, 1980 basic agreement according to the schedule of reductions and modifications set forth in Appendix A.

V. The Company will grant one 70-80 pension of reach job permanently eliminated as a result of the joint Company and Union Industrial Engineering study concurrently being made. The total number of such pensions to be made available shall equal the number of employees displaced as a result of the permanently eliminated jobs.

A. Eligible employees whose jobs are permanently eliminated shall be first offered the option to accept such pension. Employees declining the option shall exercise their rights under Section 8, Seniority of the basic labor agreement.

B. Any 70-80 pensions remaining of the number originally allocated after the election of the above option, will be made available, on a seniority basis, to eligible employees electing the same.

C. Any employee offered a 70-80 pension under this item shall have 15 days after ratification in which to accept or reject the option. Retirements shall become effective on the first day of the month following the month in which the acceptance was made.

VI. The Company will apply the money saved as a result of the reduction in wages, etc., herein provided, to operating losses, working capital, new equipment, or any other that will improve its competitive position.

VII. The value of compensation lost as a result of the implementation of APPENDIX A will be returned to the employ-

ees affected out of future profits of the Company. Fifty percent (50%) of the monthly net income before income taxes will be distributed proportionately to such employees during the month following the month in which the profit is realized except that if the distributable 50% employee portion is less than $50,000, such amount shall accumulate and be distributed during the month in which the accumulated amount equals or exceeds $50,000. This payback shall continue until each employee has recovered the full value of his lost compensation notwithstanding the termination date of this 1983 Emergency Agreement.

The Company recognizes that to overcome its financial difficulties cost-saving measures must be made with respect to all of its employees, including managerial, supervisory and non-represented workforce, hereinafter collectively called "non-unit employees." Therefore, the Company has taken the following action:

A. The salary, wage and benefits of each non-unit employee will be frozen at the amounts paid to him or her on July 1, 1982 and will not be increased by more than the amount of any increase paid to any individual unit employee during the term of the Agreement; normal promotions and demotions excepted.

B. No bonuses, production incentives excepted, will be paid to non-unit employees during the term of the Agreement.

C. In order to achieve savings and bring the ratio of non-unit employees to a more efficient level the Company agrees that it will reduce its non-unit employees as rapidly as possible, and to the extent that the Company can, using as a criteria sound business judgments.

D. The Union shall have no voice in determining the manner or method of achieving reduced levels of employment of the non-unit employees. The Company shall be solely responsible for deciding all such questions.

E. The above actions are in addition to the

steps already taken by the Company to reduce costs in the non-unit employees, these steps have included:

1. A reduction in the number of non-unit employees by 12%.

2. A salary freeze effective May 1, 1982.

3. Furthermore salaried employees have not received C.O.L.A.

F. In administering this section the intent shall be to apply the wage and benefit reductions to all employees of Connors Steel Company in an equitable manner. To insure the accomplishment of these goals the Company agrees to reduce the non-unit employees' wage commensurate to the reduction taken by the employees covered by the Collective Bargaining Agreement. The Company shall target reductions in the wages, salaries and other benefits of the non-unit employees of the plant, equal proportionally to the reductions made for the hourly work force, to be accomplished by April 1, 1983. The formula for this computation shall be the number of employees multiplied by the value per hour of the reductions in wages, salaries and other benefits, multiplied by 150 hours per month. Information confirming the equality of sharing of the non-unit employees shall be made available to an official of the Union.

SPECIAL PROVISIONS

A. The implementation and operation of this Agreement shall have no adverse effect upon the pension benefit amount of any employee retiring subsequent to March 1, 1983. Such pension benefit amount shall be calculated as if this Agreement had not been in effect.

B. The operation of this Agreement shall not affect any other rights of employees not specifically included herein.

C. This Agreement shall become void in its entirety in the event the Company's present owners should sell its interest to successors, or elect to terminate operations of the

Company. The date of avoidance shall be the day immediately preceding the day actual control of the Company is changed and the provisions of the 1980 Agreement go back to full force and effect.

D. Section 8.E. (1.2.) of the basic labor agreement shall be amended to provide that bargaining unit employees promoted to non-bargaining unit positions shall be limited to 6 months from date of promotion during which, for any reason, rights to return to the bargaining unit can be exercised.

E. Individual records of Suspended Benefits now being maintained by the Company will be amended so as to include the effect of this agreement upon employee wages; and the quarterly statements now being provided each employee shall include such effect.

F. The Company shall continue to provide the Union with Quarterly and Annual Financial Reports.

G. If any provision of this Agreement or the application thereof should become void or unenforceable for any reason, the remainder of the Agreement and the application thereof shall not be affected thereby. The parties shall promptly meet for the purpose of negotiating suitable substitute for the part or parts which become void or unenforceable.

H. This Agreement is subject to ratification by the membership of Local 2250 of the United Steelworkers of America and if so ratified shall become effective at 7:00 a.m. on the first Sunday following the date of ratification and shall remain in effect until 7:00 a.m. August 28, 1983, unless terminated earlier under other provisions of this Agreement or other termination date is mutually agreed to by the parties hereto.

APPENDIX A

ECONOMIC AGREEMENT

1. DELETE S.U.B. Contributions.

2. DELETE Savings & Vacation Plan.
3. DELETE Sunday Premium.
4. DELETE Shift Differential.
5. DELETE One Week from the present regular vacation schedule.
6. DELETE the Vision Insurance Program.
7. DELETE the Dental Insurance Program.
8. REDUCE hourly wage scale rate by 20 percent (incentive base rates to remain unchanged).

ALL of the above deletions to be effective only until 7:00 a.m., August 28, 1983.

PAYBACK PLAN

The value of compensation lost as a result of the implementation of this appendix to the 1983 Emergency Agreement will be returned to the employees affected out of future company profits. Fifty percent (50%) of the monthly net income before income taxes will be distributed proportionately to such employees during the month following the month in which the profit was realized except that if the distributable 50% employee portion is less than $50,000, such amount shall accumulate and be distributed during the month in which the accumulation equals or exceeds $50,000. This payback plan shall continue until each employee has recovered the full value of his lost compensation notwithstanding the termination date of the 1983 Emergency Agreement.

APPENDIX T

Local 2250
United Steelworkers of America
District 36
Birmingham, Alabama

June 23, 1982

To: All Members of the United Steel Workers of America, Local 2250

Dear Sir and Brother:

As you probably know, the Company informed the Union in a meeting held on the 1st of June that its financial condition had deteriorated to a point where they had to have some relief. We informed the Company that before we could consider anything of that nature, that it would be required of the Company for our International Union to look at the Company's books. The Company agreed to this requirement. Director Thermond Phillips, after being informed of the Company's request, asked President Lloyd McBride to assign someone to check the Company's books. President McBride assigned Mr. Jim Smith, who is the Acting Research Director of the International Union, and also is an assistant to President McBride, to this task.

Mr. Smith requested from the Company certain financial information necessary to ascertain the Company's financial position and that information was furnished. Mr. Smith, assisted by Mr. Olivwer Montgomery, checked all the data necessary and informed the local union that the Company was in fact in fnancial difficulties due to the economic condition of the country and just as importantly, due to the competitors who are in business making the same products that are made here in our plant. During the first five months of 1982, the Company lost $1,595,000 which means that for every ton of steel shipped, the Company lost $20.36 per

ton. This Committee is convinced that the information we have received is accurate and we feel that it would be a mistake for any of our members, in considering this serious problems, to think that something was being hidden. The facts will not bear out such an assumption. This Committee feels that it has an obligation to you to find the real truth and relay that trut to you so that you can make an honest judgement in your mind whether or not you should make wage and benefit concessions.

In checking the data furnished to the Union by the Company, it was pointed out to us that Connors Steel Company has been a successful Company and hopefully, given some temporary reflief, will become successful again and for that reason, your Committee is making recommendations to you that we feel, at least on a temporary basis, will allow Connors Steel to survive during these adverse times and at the same time, keep our jobs intact.

Mr. Jim Smith informs us as follows regarding wages in the steel industry.

All District Steel In District 36	Period	All Basic Steel United States	Connors Steel Co. Average Wage
$12.31	1st Qtr. 1981	$12.40	$12.85
12.44	2nd Qtr. 1981	12.58	13.26
12.57	3rd Qtr. 1981	13.02	13.45
13.00	4th Qtr. 1981	13.31	13.49
13.14	1st Qtr. 1982	13.39	13.99

You can see that our members in Connors Steel Company have consistently been above our brothers and sisters in our district and also throughout the United States.

If the recommendations of this Committee are approved by our membership, we have negotiated a Suspended Benefit Recovery Program, which means that once the Company returned to profitability, there is a system by which all members will be repaid of "made whole" for all suspended benefits. You will received a written statement from the Company each fiscal quarter, showing the amount and detail of your deferred entitlements. A top Union Management Committee has been selectedf to eitlıer

provide a profit sharing or stock plan as a vehicle by which recovery will be made. This Plan must be completed within 60 days or this Agreement can be cancelled by either party. We have also agreed that a study would be made of the need for continuing the present manning levels of all plant jobs. This study will be conducted by a United Steel Workers of America industrial engineer and a Company industrial engineer. If, at the conclusion of this study, it is decided that manning levels can be reduced, then the Company will grant one 70-80 pension for each job eliminated, and any employee whose job is eliminated as a result of this study, will have the option to accept or reject a 70-80 pension, provided the employee is qualified. If an employee is not qualified, or rejects the 70-80 pension, then employees who suffer under some form of disability will be identified and considered for the 70-80 pension. If the 70-80 slots are not used by the two groups just referred to, then the 70-80 slots will be allotted (sic) and made available on the basis of seniority to any qualified employee electing the same. The number of 70-80 pensions alloted (sic) shall not be less than the number of persons displaced as a result of this study. We have also negotiated an equality in sharing agreement which means that all non-unit employees who work for Connors Steel Company will share in salary and benefit reductions in the same measures as bargaining unit employees share. During this temporary period, there will be no bonuses paid to non-unit employees and in addition to reductions already implemented by the Company, the Company is bound by this Agreement to continue its cost saving efforts. The Company has also agreed that all monies saved as a result of these concessions will be applied to opreating losses, working capital, new equipment and other areas that will improve the Company's competitive position at the Connors Birmingham Plant. The Company has further agreed to provide quarterly and annual financial reports to the International Union Research Department including confidential information as needed so that we will have complete understanding regarding the Company's financial condition. We have agreed, subject to your approval, that during this emergency period, effective July 1, 1982 and expiring August 28, 1983, that we accept a freeze on all negotiated benefits in the current collective bargaining agreement not yet in effect, except those increases in the minimum pension benefit formula scheduled to become effective September 1, 1982. In addition, we

feel it is necessary, effective July 1, 1982 that we accept a 20% wage reduction. During the calendar year 1982, the day after Thanksgiving will be given up as a holiday. Effective January 1, 1983, an additional three holidays will be given up. They are George Washington's Birthday, Good Friday and Memorial Day and all vacation scheduled will be reduced during the year 1983 by one week and during the year 1983, there will be no vacation bonus.

We realize that these reductions will be hard for all of us but we also believe that if we do not make these sacrifices now, that Connors Steel will cease to operate. We hope that the Company's financial condition will take a drastic turn for the better and if it does, we have provisions in the Agreement to reinstitute some or all of the suspended benefits.

A ballot is enclosed in this envelope along with a prestamped, preaddressed envelope. We would appreciate your immediate response either approving or rejecting these proposals. The ballots must be postmarked no later than July 6, 1982.

Signed:

_____

Carl Statum
Sub Dist. Director
District 36 - U.S.W.A.

_____

Tom Kimbrell, President
Local Union 2250 U.S.W.A.

James Norman, Vice President and
Chairman, Grievance Committee
Local Union 2250 U.S.W.A.

Frank W. Anderson, Committeeman
Local Union 2250 U.S.W.A.

A. C. Buttram, Jr., Committeeman
Local Union 2250 U.S.W.A.

Joe Frost, Committeeman
Local Union 2250 U.S.W.A.

APPENDIX U

EXCERPT FROM AN ASSESSMENT OF FUTURE VIABILITY

BROWN'S PRODUCTS & SERVICES CORP.
3620 N.W. Sylvan Drive
Corvallis, Oregon 97330
(503) 754-6259

August 28, 1982

Mr. Eugene L. Hofmann
Connors Steel Company
P. O. Box 577
Birmingham, Ala 35201

Dear Gene,

Two copies of my report to Keith are enclosed for you and Omer. I decided to send these ahead as Keith will be receiving his copies at about the same time and he may call you for comments.

Please note that the report is quite different from the hand-written notes which we discussed. The substance is the same, but some of my conclusions, etc. are different. These resulted from further thinking during the preparation. Please feel free to criticize and express your reactions to Keith about. This really is the first crack and it will require more rework before it becomes the basis of a feasible plan.

I have suggested to Keith that, if the Scenario III is to procede, a much more detailed plan be developed in which more accurate data would be used. I also suggested that this be the basis for the 1983 profit planning. We shall see how the wind blow in Pittsburgh.

Will be back on Tuesday evening, September 7, and will see you Wednesday morning.

Sincerely yours,

/l.s./ Illegible

U-3

CONNORS STEEL COMPANY

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AN ASSESSMENT

OF

FUTURE VIABILITY

A Report prepared by -

BROWN'S PRODUCTS & SERVICES CORP.
3620 N.W. SYLVAN DR.
CORVALLIS, OR 97330

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CONNORS STEEL COMPANY

ASSESSMENT OF FUTURE VIABILITY

SUMMARY OF THE REPORT

1. The present product mix of Connors Steel Company makes it extremely vulnerable to general economic conditions with large swings in profit as the result of relatively small swings in scrap prices and product market prices, both factors outside of the control of Connors.

2. Price vulnerability exists principally in the run-of-the-mill carbon-steel merchant bar and structural products (called "Class 1" in the report) now more than 80% of the Birmingham production. It is in these products that Connors competes head-on with the mini-mills.

3. Continuation of the present course, with scrap prices and product prices at present levels, will continue to generate losses even with the reduction in wages and salaries and with at least $185,000 per month of assured cost improve-

ment in place.

4. Prices of the special bar quality products (called "Class 2" in the report) are comparatively stable because

-Many are special sections proprietary to one or a small group of customers which are not generally tooled in the industry,

Product pricing is generally based on the more stable pricing policies of "Big Steel" even though the large producers often shun these products as the order quantities are too small to be scheduled in accordance with their large-run policies.

Customers are willing to pay more for quality and service than they are for the Class 1 products which can be purchased from a great number of sources.

5. Connors Steel can be converted to a viable operation by shifting the product mix in the direction of the high-quality products, becoming a specialist in those products for which the customers expect top quality and service. It is reasonable to believe that the product mix can be shifted from the present level of only 20% Class 2 to 55% in three years. Upon completion of the program, profits can be attained ranging from $8 million to $15 million per year depending on the state of the economy at that time.

Investment of about $14.6 million will be required during 1983 through 1985 to

-Properly equip the Birmingham Plant ($10.8 million) to be able to produce quality products by adding

Complete quality control facilities: first-class laboratory, operations press control and finished product inspection and conditioning.

Cast billet descaling, inspection and conditioning.

New vertical roll stands and hot saws for the rolling mill, and

A more powerful drive on the drawbench.

Provide about 40 sets of new rolls ($3.8 million) which will add about 60 new sections to the present product line, each new section providing around 2,000 tons of Class-2 product per year.

6. After completion of the program to convert (3 years), the annual return on new investment should range from 19% to 32% on the total investment in Connors from 9% to 15%, depending on the economic condition at that time. (Note - a cash-flow-discount return analysis has not been made).

7. The suggested program will require three years of intensive, well managed effort. But, it is certainly feasible and within the capability of the organization as it is now staffed. There would be no sudden change in operating results but change only at the rate that

The market penetration for Class 2 products can be developed,

The needed quality and managements (sic) systems can be designed and implemented,

The incremental technology can be developed, and

The equipment needs can be planned, procured and installed

without expensive and disruptive effect on continuingoperations.

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CONNORS STEEL COMPANY

ASSESSMENT OF FUTURE VIABILITY

INTRODUCTION

The Connors Steel Company, by its history, has demonstrated that its profitability is totally dependent upon the general economic condition of the country. Suitable profits have been made only when the demand for steel was so great that

Connors could operate at, or near to, capacity, and

The market prices, in relation to the cost of scrap, were much larger than they are now.

But the nature of the steel industry and the steel market has changed such that it appears to be unlikely that the environment for large profits will occur again in the forseeable future. Whereas Connors had reasonable price stability in the past provided by the "Big Steel" reluctance to change price even in times of economic stress, Connors now competes more directly with the mini-mill segment of the industry which has demonstrated a practice of cutting prices to gain a market penetration advantage. The most significant factor in Connors profit decline has been in the forced acceptance of reduced product prices.

In addition, now that Connors has been shifted away from competition with "Big Steel" into competition with the mini-mills, costs of producing at Connors are no longer competitive. Connors grew as a segment of "Big Steel." Its mode of management was to use "Big Steel" as the pattern for its operation. Aside from being a pioneer in strand-casting, the facilities and operating practices copied those of the large steel plants. Independent labor negotiations were shunned in favor of following the "Big Steel" package. As a result, when the mini-mill industry grew based upon Con-

nors pioneering in strand-casting, Connors had a comparatively high-cost operation.

The mini-mills, in general, installed facilities based on the most up-to-date technology. They successfully resisted organization of their labor force by the United Steel Workers of America. They streamlined their management practices. This combination provided the mini-mills with a much lower unit-cost than Connors: higher productivity, lower labor cost, and less overhead. As a result, it is difficult to identify any basis upon which Connors can function with cost competitiveness.

It must be noted also that the arrangement of the Birmingham Plant, having been planned originally on the basis of a different processing technology and having new additions patchworked into the original arrangement, is not particularly condusive to lowest-cost operation. The cross-direction arrangement of the roliing mills without space for extension and the jumble of finishing and warehousing in several unrelated buildings results in excessive handling and rearrangement of product. The cost of such further precludes, without virtually rebuilding the entire plant, ever attaining cost competitiveness with the new, properly arranged mills.

Recent efforts to improve Connors' situation have helped to reduce costs, but, short of the re-establishment of an economy that will permit independent product pricing, the best efforts will be to only produce a relatively small profit.

Therefore, it is the intent of this assessment to find a course for Connors Steel that will provide stability, even without the best economic conditions. Since any change in course will require further investment, the question is whether or not the profit will be sufficient to cover the cost of increased investment and still provide a suitable return on the combination of present plus added investment.

METHOD OF ASSESSMENT

The most significant variable affecting profit from month-

to-month, other than volume of shipments, is the product mix. Investigation shows that the products produced by Connors fall into two distinct categories, those which in the first six months of 1982 average less than $35 per ton, in margin over variable costs, and those which averaged over $125 per ton. From this a generalized relationship has been developed for the profit-before-tax (excluding LIFO and interest payments) as a function of the tons shipped each month and the proportion of the shipments in the low margin category. To this, empirical cost values have been applied based on the expectations at the end of 1982. The detail of development is provided in Addendum A. Exhibit I graphically demonstrates the results of the profit relationship.

From this, it is obvious that the profitability of Connors can be greatly improved at any shipment level by increasing the proportion of higher-margin products. Consequently, three future courses have been evaluated as alternatives:

Scenario I — Continuation of operations as they were during the first six months of 1982 with the proportion of low-margin product at 82.4%. With this condition, no further capital investment is required and the work on providing anti-friction bearings for the finishing-mill stands could be stopped.

Scenario II — Continuation of operations as they are forecast for the fourth quarter of 1982. This condition will have a proportion of law-margin product at 70% and will require further investment to finish the application of the anti-friction bearings plus other items during the balance of 1982 to provide essential facilities to sustain the level of high-margin products.

Scenario III — Continuation, after the end of 1982, of the addition of new higher-margin products at the rate that the market can be penetrated and the tooling and production capability can be provided. This is believed to be a realistic scenario as it has been found that new SBQ product, e.g., forging billets and special sections for Caterpiller tractor, can be added even though the economy does not permit an expansion in the volume of low-margin product. For this scenario, however, sizeable investment will be required to provide rolls for new sections and mill/finishing facilities to process as well as to provide much more extensive quality facilities to meet the standards which will be required by customers.

These scenarios are evaluated in Addenda B, C, and D, respectively. For all, the following general assumptions have been made:

The economy during the 1983 through 1985 period will remain such that the value of lower-margin products will not increase beyond the average for the first six months of 1982.

Market prices will remain constant with the price of law-margin products being $10 per ton higher than at present to include the price increase announced for September.

Scrap prices will remain at present levels.

The reduced wages of both hourly and salary personnel

will remain at present levels for the three-year period.

There will be no further Cost Improvements beyond those which are firmly in place at the end of 1982 at a level of $185,000 per month.

Each scenario has been evaluated for the period of the next three years, the period required to accomplish the objectives of Scenario III. In addition, a future profit projection has been made for the conditions at the end of 1985. The sensitivity of the profit to selected risk-factors has also been evaluated.

Addendum E provides a comparison of the three scenarios with a crude estimate of the annual return on the incremental investment required.

RESULTS OF SCENARIO EVALUATION

In addition to the straight profit projection for each Scenario, an attempt has been made to show the range of potential profit by applying some risk factors both positively and negatively.

SCENARIO I — Static conditions related to the 1H82.

I.B.T. ($1,000 units)	1983	1984	1985
Minimum (Note 1)	$(2,275)	$(2,265)	$(2,245)
Projected (Addendum B)	$(350)	$(330)	$(320)
Maximum (Note 2)	$1,080	$1,100	$1,110

Thus the best that can be expected is an I.B.T. (Income-before-tax) of $1,110,000 unless there is a real shortage of supply. But, if the price of scrap goes up 5% ($2.80 per ton) and the expected September price increase of $10 fails to

hold, losses could easily be $2,250,000 per year.

SCENARIO II — Static conditions related to the 4082.

I.B.T. ($1,000 units)	1983	1984	1985
Minimum (Note 1)	$(280)	$(310)	$(275)
Projected (Addendum C)	$1,330	$1,330	$1,330
Maximum (Note 3)	$4,450	$4,450	$4,450

If the volume of Class 1 products can be built to the level of the 1H82 and the volume of Class 2 products held at the level forecast for the 4082, the profit can be as high as $4,450,000. But, if the scrap price goes up and the Class 1 product price does not increase, the best that could be expected would be about breakeven.

Scenario III — Growth based on the planned penetration of the Class 2 product market.

With successful completion of a planned conversation to special products, profitability would be assured even with variations in the uncontrollable market prices for Class 1 product.

Note 1: The minimum I.B.T. calculations are based upon a 5% increased in the price of scrap and failure to hold the price increase of $10 per ton for Class 1 products announced for September 1982.

Note 2: The effect of an additional price increase of $10 per

ton for Class 1 product.

Note 3: The effect of an additional product price increase of $10 per ton Class 1 product plus the additional considerations given in Addenda C and D, respectively.

I.B.T. ($1,000 units)	1983	1984	1985
Minimum (Note 1)	$1,734	$4,463	$8,157
Projected (Addendum D)	$3,390	$6,190	$9,875
Maximum (Note 3)	$4,760	$8,030	$12,190

The extreme swing of profit in all three Scenarios demonstrates the vulnerability of Connors Steel in an economic climate which provides a demand at less than capacity of the steel industry. Scenario III obviously provides the best condition for the company, once it is attained. But, it is necessary to assume that Connors can generate at least 120,000 tons per year of special bar quality products.

The conditions applied to evaluate possible profit swing are considered to be realistic.

Scrap supply can tighten quite easily. The recession has reduced the generation of both obsolete and prompt scrap. There has been less of a reduction in electric furnace melting than in the other types of steel production. A small increase in demand for scrap or a pick up in exports could give a short-supply condition for at least a few months until generation increases in response to the increased usage of steel. A price increase would result.

The $10 per ton increase in market price announced by Nucor for September is considered to be "trial balloon".

Scrambling by other producers for fourth quarter orders with the promise to deliver at the lower prices could nullify the price increase.

The price reduction in May 1982 of $20 per ton was in line with the corresponding drop in scrap price. The June reduction, however, appears to have been punitive. If the September increase of $10 holds, the recovery of the other $10 of the June decrease is probable at some time in the 4082.

CONCLUSIONS OF THE CONSULTANT

Connors Steel can be made a profitable operation, less succeptable (sic) to the effects of economic cycles, with a good return on investment. To accomplish such, however, will require a well-planned, well-managed program similar to that used for the Scenario III evaluation. Additional investment will be required equal to about 75% of the present net investment. In addition, if the new course if adopted, the H.K. Porter Company management must be fully dedicated to seeing it through and must have the patience required to accept less than maximum results while the conversion process is going on.

Connors has many strengths which provide a firm foundation for the suggested program and which give confidence that it can be carried out:

As a result of the products which were produced at Huntington, Connors Steel, per se, is well established in the special product market.

Connors has an excellent reputation for service to their customers.

The Sales Department is well acquainted with the special quality market, currently calls on the users and has a firm market based upon which to expand. Many of the Department individuals are real professionals in this market segment, having extensive experience in prior jobs.

With the change from operations-oriented to market-oriented management in the last few months, a good head-start has been obtained by:

Directing selling activities more toward special products,

Establishing the beginning of a quality program to the extent possible with the present staff and facilities,

Redirecting operations management toward the needs of being a high-quality, special product producer and away from being a volume-oriented shop with quality attention only when trouble has developed with a customer,

The melt shop has the full capability required for the suggested future course. It operates efficiently. The supervision recognizes the problems which have to be faced and is already taking steps to remedy the deficiencies. Very little change will be required in the facilities.

The employees at Birmingham are dedicated to the business and are determined to survive. They are very receptive and are anxious to follow the guidance of the management toward a new course.

There are also a number of significant weaknesses in the facilities and in the product quality areas. But the time and means required to overcome these weaknesses are the reason for a program to change course. Otherwise, the program would be solely one of market penetration.

The evaluations made in this report clearly indicate that a viable future for Connors requires change. It should have been recognized and implemented before now. The need has been clear in the planning for at least four years but those plans have never been carried out.

Scenario I offers nothing. With the breakeven at 80% capacity, only best economic conditions can provide profit. And the business is too sensitive to market variations beyond the control of Connors. Continuing changes in market prices, controlled by seemingly irresponsible action of some mini-mill operators, will always keep Connors in a condition of feast or famine without ever knowing what the immediate future will bring. The risks are too great to continue operations.

Scenario II is really a holding operation to provide a tee-off point whenever Company is ready to go ahead with the Scenario III plan. This alternative is somewhat less sensitive to economic conditions that Scenario I as the breakeven point is at 70% of capacity. But it is not too realistic as it would be too difficult to maintain the 30% level of Class 2 product without a program that provides new products as old ones fall by the wayside. A near-term revival of the economy would produce significantly better profit results than those projected because of additional volume. But, without time to consolidate the changes needed in attitude and practice to assure continuation of the 30% proportion of Class 2 product, the business could be expected to revert to Scenario I with its inherent weaknesses.

It is also believed following this course would lead to degradation of the business through the loss of key people, lowering of operating efficiency and just the shear boredom of having no challenge. The present climate of enthusiasm could perhaps be sustained for a short time, but there are already some signs of a slackening. A common question is, "What is our future?"

Scenario III offers a future course of growth for Connors Steel beyond just that projected for the next three years. Upon completion, a profitable platform will exist upon which plans can be laid for expanding the capacity and market coverage. With a fully established quality capability, new market directions are opened up which cannot even be thought about. It could even be possible to plan penetration into the aerospace, nuclear and high-technology markets where the margins are much greater. At

least, the range of choices for future growth would be more numerous.

There are two primary needs which are required to follow the course suggested by Scenario III:

> Strong professional management at Connors Steel providing the ability to meet current operating objectives simaltaneous (sic) with moving forward without deviation in implementing the new program without confusion and detriment to the on-going operations.
>
> Full support by the H. K. Porter Company management making assistance available to Connors in various management areas until Connors own staff can be expanded and integrated.

A lesser course than that suggested in Scenario III is of course possible. Detail planning may show that all of the proposed facility changes are not essential or cannot be put in place on the time schedule indicated. In making this study, many additional facility alterations and improvements were considered, such as equipping all of the rolling mill stands with anti-friction bearings or erecting new finishing buildings to permit streamlining of the operations. But these were rejected on the basis that they were not absolutely necessary and would merely increase the investment necessary without significant additional gain. Thus, the remaining items appear to be essential and charting a middle-course would only extend the period of vulnerability.

APPENDIX V

CONNORS
STEEL COMPANY
POST OFFICE BOX 577 BIRMINGHAM, ALABAMA 35201
(205) 592-8981

February 9, 1983

Dear Fellow Employee:

As you know, we have had shop-floor meetings with you during the past two days. During these meetings, we have attempted to explain as best we could the financial plight we are in and our need to immediately reduce our costs in order to keep Connors operating.

We have met with your Committee for the purpose of explaining the situation and exploring the possibilities of further concessions which, if we are to continue operations, we must have.

Your Committee is of the opinion that they are without authority, because of a recent motion passed at your last monthly union meeting, to enter into negotiations with us concerning concessions without your express approval.

If we are to survive as a Company, it will require major sacrifices from all of us. You may or may not be willing to make the sacrifices needed — but you cannot make that determination until you know what it is you are being asked to give up. If your Committee is unauthorized to even enter into negotiations, or bargaining, or discussion (or whatever term is appropriate in circumstances like this) with us concerning the matter, then you will never know what it was you were being asked to do.

Enclosed with this letter is a letter from your Union officials and a ballot, asking you to give them the authority to enter into negotiations with us concerning further concessions; it does not ask that you authorize them to agree to anything — only that they be authorized to enter into negotiations.

We earnestly request that you do so authorize them by marking the ballot accordingly and returning the ballot in the self-addressed, stamped envelope.

Please understand that if you do not authorize them to enter into negotiations, you are in effect saying to your Committee and to us that you are not willing to make any concession whatsoever to keep Connors in operation. If this is your decision — and we sincerely hope that it is not, — then we are obligated to inform you that Connors will have no alternative but to cease operations.

Respectfully yours,

/l.s./ illegible
/l.s./ illegible
/l.s./N. E. Wagner, Jr.

APPENDIX W

FIVE GATEWAY CENTER, PITTSBURGH, PA 15222

July 9, 1982

PERSONAL AND CONFIDENTIAL

Mr. Carl Statum
International Representative
United Steelworkers of America
1825 Morris Avenue — Suite B
Birmingham, AL 35203

Dear Carl:

We have reviewed the proposed Memorandum of Emergency Agreement between Local Union 2250 and the Connors Steel Company. You and the Local Union negotiators have done an excellent job in negotiating this document. However, there are a few areas of concern that we would like to call to your attention. These areas are crucial. If you and your negotiating team did not intend to leave them out, it would be wise to make certain that they are covered before the document is signed.

All of our concession agreements are a type of investment bargaining or a deferred entitlement recovery program. This means that at some time in the future the Company will make the employees whole for all wages and benefits which have been deferred, postponed, delayed, reduced or affected by these emergency agreements. The language in the areas of restoration of benefits and the recovery of concessions granted the Company must be very definitive and precise.

Our financial analysis of this Company shows that Connors Steel has made and can make money if given a helping hand. You have provided that needed help in your Memorandum of

Emergency Agreement. Most companies want concessions without reciprocity. Connors Steel is no different.

Specifically, Carl, the Memo is deficient on two points, which are as follows:

1) Paragraph (1) on page 1 suspends certain benefits which are not yet effective and restores them on August 28, 1983, **unless** a new agreement is reached before that date. However, items 8A through 8E on page 7, reduce quite drastically wages and benefits which the members currently enjoy. There is no provision whatsoever in your agreement for the restoration of **those** wages and benefits which are referred to in paragraph 8 if a new agreement is not reached by August 28, 1983. I do not, of course, know whether this is an oversight or deliberate. If the lack of a provision for restoration of those benefits is deliberate, I think it is a serious mistake.

2) Far more important than the problem with item (1) above is the problem of paragraph 4A on page 3. 4A defines "suspended benefits." The definition limits the term to include only those "wages and benefits which have been deferred, postponed, delayed, reduced or affected by the provision of **Paragraph 1 and 3 above**." This definition, because it make no reference to paragraphs 8A through 8E on page 7, means that when the workers receive their suspended benefits they will only receive the 23 cents a hour and COLA increase scheduled to become effective hereafter. They will **not** receive the 20% wage cut of paragraph 8A nor will they receive any reimbursement for the holidays and vacations sacrificed under paragraph 8A.

Carl, I do not see how we can agree, at this time, to take enormous pay cuts out of people's wages in a steel mill, under a

contract which is currently in effect, and tell them that they are never going to get the money back no matter how profitable the Company may become in the future. Accordingly, unless Thermon (sic) convinces President McBride otherwise, I think it is necessary to correct the agreement with respect to item (2) above, before it is signed by President McBride.

Again, of course, this could simply be an oversight. If so, the Company should have no trouble agreeing to correct it. However, if you have actually agreed to that then I think we have a serious problem that we need to discuss at your earliest convenience.

With best personal regards, I am

Sincerely,

James W. Smith
Assistant to the President

JWS:mp

APPENDIX X

UNITED STEELWORKERS OF AMERICA
DISTRICT 36
SUITE B - 1825 MORRIS AVENUE
BIRMINGHAM, ALABAMA 35203-3179

Telephone
205-326-4160

Thermon Phillips
Director

February 16, 1983

To All Members of Local Union 2550
United Steelworkers of America

Dear Brothers and Sisters:

The word "crisis" often is overused, but in the case of Connors Steel it is appropriate.

The blunt fact is that Connors Steel could die as a company and take with it the families that depend on its survival. If Connors is to survive, it will require conceding some wages and benefits to the company, to be repaid through future profits. The documents with this letter list those specific items and how they will be repaid.

We know how hard it is to give up wages and benefits, and this Committee has tried very hard to keep these concessions to a minimum; but we are convinced that unless we take these short-term actions that the company states it must have, Connors Steel will cease operations. Our jobs will be lost permanently.

Mr. Keith R Garrity, President & Chief Operating Officer of H.K. Porter Company, Inc., met with us on Wednesday, February 16, and informed us that unless we could stop the negative cash flow problem facing Connors Steel, he had no option but to close the plant on March 1, 1983. He further stated that if the company could

continue operations, it is the company's intent to get out of the "barnyard" steel products, into special bar quality and high strength low alloy products. Mr. Garrity feels strongly that Connors Steel can become a strong, viable and profitable company with these products.

As you know, last July we made an investment in Connors Steel Company. When we did that, we felt the steel business would not get any worse — what happened? Our competitors have cut prices three different times since then. Recession turned into depression, the worst the American steel industry has faced in more than a half century. These matters will not resolve themselves. We know this is a difficult, frustrating, even bitter step for you to take, as it is for us. But the alternative, it seems to your Committee, is even worse.

If we can turn this negative situation around, we have negotiated a payback plan that insures you will have returned to you every penny in wages and benefits you are sacrificing now.

This Committee, made up of your Officers and Committeemen, is not responsible for the situation we find ourselves in; they do not deserve to be criticized. They, like you, are not responsible for this, but are the ones whose responsibility it is to listen to management and then relay the fact to you. We have tried to live up to our responsibility, no matter how much we disliked it. Like us, you will not like to read the details attached. Nevertheless the responsibility now falls on you. By your vote, you will decide your own destiny and that of your brothers and their families. You are voting to save your jobs.

Enclosed is a ballot and a self-addressed envelope. We ask that you mark your ballot and return it to us as soon as possible -- no later than Monday, February 21, 1983.

Sincerely,

/l.s./

Carl Statum
Sub Dist. Director
District 36 - U.S.W.A.

/l.s./

Tom Kimbrell, President
Local Union 2250 U.S.W.A.

/l.s./

James Norman, Vice President and
Chairman, Grievance Committee
Local Union 2250 U.S.W.A.

/l.s./

Frank W. Anderson, Committeeman
Local Union 2250 U.S.W.A.

/l.s./

A. C. Buttram, Jr., Committeeman
Local Union 2250 U.S.W.A.

X-4

/l.s./

Joe Frost, Committeeman
Local Union 2250 U.S.W.A.

6

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-1535

CALVIN L. PARKER, et al.,

Petitioners

v.

CONNORS STEEL COMPANY, H. K. PORTER COMPANY, INC.; AND UNITED STEELWORKERS OF AMERICA, AFL-CIO, CLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Harry L. Hopkins
Duncan B. Blair
Counsel of Record

OF COUNSEL:

LANGE, SIMPSON, ROBINSON & SOMERVILLE
1700 First Alabama Bank Building
Birmingham, Alabama 35203
(205) 250-5000

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1700 First Alabama Bank Building
Birmingham, Alabama 35203
(205) 250-5000

QUESTION PRESENTED FOR REVIEW

1. Whether a district court's knowledge of a possible violation of 28 U.S.C. § 455 requires reversal of a summary judgment order, which order is affirmed on the merits upon plenary review, where there is no risk of injustice to the parties, no risk that the denial of relief will produce injustice in other cases, and no risk of undermining the public's confidence in the judicial process.

2. Whether a law clerk can "become the judge" under 28 U.S.C. § 455(b)(5)(iii), where the statute itself makes no such provision and the case law decided thereunder does not support such a proposition.

3. Whether §§ 7 and 8 of the National Labor Relations Act preempt state law fraud

claims based on representations made by an employer in collective bargaining.

4. Whether the arbitrator's award bars plaintiffs' state law fraud claims.

5. Whether the district court correctly granted summary judgment on plaintiffs' hybrid § 301/fair representation claims.

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RESPONDENT'S BRIEF IN OPPOSITION

STATUTES INVOLVED

The statutes involved are 28 U.S.C. § 455, 28 U.S.C. § 2111, Sections 7 and 8

of the National Labor Relations Act, 29 U.S.C. §§ 157 and 158, and Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

STATEMENT OF THE CASE

This lawsuit arises out of the closing of a steel plant in Birmingham, Alabama because of continued losses suffered by the plant in the early 1980's. Connors Steel Company, a wholly owned subsidiary of H. K. Porter, Inc. (Connors and Porter are collectively referred to as the "Company"), was primarily a producer of reinforcing steel bars. Largely as a result of increased competition from "mini-mills" in the reinforcing steel market, Connors' Birmingham facility suffered $1,594,000.00 in losses during the first five months of 1982.

In June 1982, Connors' representatives met with a representative of the United Steelworkers of America (the "Union") to consider Connors' proposals for relief from certain economic and

benefit provisions of the 1980 collective bargaining agreement between Connors and the Union. During the meeting, the Connors' representatives stressed the amounts of the 1982 monthly losses; the negative economic forecast for the remainder of 1982; the need for immediate relief; and their belief that, absent relief, the Birmingham plant would have to shut down.

A second meeting was held between Connors and the Union, at which the Union reviewed Connors' financial records. The two parties subsequently negotiated the terms of a concession agreement, during which the Union insisted on two points. First, any economic concessions would have to be paid to employees if Connors became profitable. Second, no concessions would be granted with respect to

the pension and insurance provisions of the 1980 agreement.

The concession agreement which resulted from these negotiations suspended certain wage and benefit increases that were scheduled to go into effect on September 1, 1982; reduced wages by 20%; reduced certain other benefits; and provided for complete repayment of all wage and benefit concessions if Connors returned to profitability. The Union recommended the concession package to its membership, and the members subsequently approved the concession agreement.

Notwithstanding the relief obtained under the 1982 concession agreement, monthly losses at Connors continued to mount. By the end of 1982, Connors' yearly losses exceeded $9,000,000.00. The president of Porter told Connors'

management that the Birmingham plant would have to immediately achieve break-even performance or face the possibility of a shutdown. Connors and the Union thereupon negotiated a second concession agreement which provided that hourly employees would forego supplemental employment concessions, certain savings and vacation benefits, Sunday premiums, certain shift differentials, certain vision and dental benefits, and would reduce their hourly wage scale by 20%. The agreement also provided for complete restoration of all wage and benefit concessions if Connors returned to profitability. The Union recommended the second concession agreement, and the agreement was ratified by the membership.

Based upon certain recommendations made by Mr. Graham Brown, an independent consultant, Porter invested over

$1,000,000.00 into Connors to begin production of a higher quality, more profitable bar steel. These expenditures were intended to bring Connors to a break-even point of production. Despite these expenditures and the relief obtained from the second concession agreement, Connors lost $4,791,000.00 from January to August 1983.

Because the 1980 collective bargaining agreement was due to expire on September 1, 1983, Connors and the Union began negotiating a new agreement. Connors' final proposal for a new agreement was rejected by the union membership on August 3, 1983. On August 9, 1983, Connors gave notice to the Union that operations at the Birmingham plant would cease on September 1, 1983. The agreement was submitted a second time to

the employees, and for the second time was rejected.

In October 1983, Connors and the Union commenced negotiations on the effects of the plant closing. Because the Union objected to the manner in which Connors intended to compensate employees for benefits under the 1980 collective bargaining agreement and the two concessions agreements, the parties agreed, pursuant to the grievance and arbitration provisions of the 1980 agreement, to submit all differences arising out of the plant closing to an arbitrator for resolution. Subsequently, the hourly employees prepared seven grievances complaining that regular and vacation pay had not been fully paid; that all employees at closing were entitled to layoff status and the benefits flowing therefrom; and that

employees should be paid the value of benefits given up in the 1982 and 1983 concession agreements. These issues, along with issues that Connors and the Union had already agreed to arbitrate, were submitted to arbitration.

Prior to the arbitration hearing, plaintiffs filed two unfair labor practice charges with the National Labor Relations Board. The charge against Connors alleged Connors had bargained in bad faith in violation of Section 8(a)(5) of the National Labor Relations Act. The charge against the Union alleged the Union had violated its duty of fair representation under Section 8(b) of the Act. Shortly after the charges were filed the NLRB advised plaintiffs' counsel that the charges had been fully investigated and considered but that further proceedings were neither

warranted nor permissible because the charges had not been filed within the six-month limitations period of Section 10(b). A subsequent appeal of the dismissals was denied by the NLRB's general counsel.

Plaintiffs then filed this lawsuit in Alabama state court alleging (1) various breaches of the Union's duty of fair representation; (2) breach of the collective bargaining agreement and the two concession agreements by Connors; and (3) fraud and bad faith against the Company in negotiating and inducing the employees to ratify the two concession agreements. The case was removed to federal court.

Following removal, the arbitration hearing took place. The arbitrator issued an award deciding two of the several issues in favor of the Union.

Pursuant to the award, Connors issued checks totalling $243,932.66 to 586 former bargaining unit members of Connors.

On July 31, 1987, the district court granted summary judgment in favor of defendants. More than two years prior to this order, the district court judge, Judge Seybourn H. Lynne, announced his tentative opinion that defendants were entitled to summary judgment (R-87, p. 5 n. 2). However, at plaintiffs' request, the court withheld action on summary judgment until discovery was completed.[1] At the time summary judgment was entered, Judge Lynne's law clerk was William G. Somerville, III, the son of a senior partner in the law firm representing the

---

[1] It is undisputed William G. Somerville, III was not Judge Lynne's law clerk at the time of this announcement.

Company.[2] Prior to the issuance of the order, Somerville held a conference with counsel to review previously briefed legal positions of the parties.[3] In his summary judgment opinion, Judge Lynne credited his clerk with assistance in the formulation of the opinion, reviewing the record, and discussing with the judge "how the law should be applied to the material facts as to which there is no genuine issue."[4] (R-87, p. 5).

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[2] William G. Somerville, III's father, William G. Somerville, Jr., was a former law clerk to Judge Lynne.

[3] Although characterized by petitioners and the Eleventh Circuit as a "hearing", this meeting was northing more than a conference to familiarize the law clerk with the legal issues presented by the lawsuit and with the positions and theories held by the parties.

[4] Petitioners claim the law clerk himself determined whether there were material issues of fact (Petition for Certiorari, p. 11). The passage from Judge Lynne's memorandum opinion cited by petitioners in support of this allegation makes it clear Somerville did not himself determine if there were issues of material fact, but instead discussed with the

Following the issuance of the order, petitioners filed a motion to recuse under 28 U.S.C. § 455(a) and (b). This motion was denied by the district judge.

REASONS FOR DENYING THE WRIT

I. The Eleventh Circuit's Opinion that Reversal is not Automatically Required When a Judge Has Knowledge of Facts Which May Require Recusal Under 28 U.S.C. § 455 Conforms With the Opinions of this Court, Opinions from Other Circuit Courts of Appeal, and Federal Statutory Law.

In Liljeberg v. Health Services Acquisition Corp., 468 U.S. ____, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), this Court squarely held the doctrine of harmless error is applicable to judgments rendered by judges who, in violation of 28 U.S.C. § 455, have presided over actions in which their impartiality might

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Court how the law should be applied to undisputed facts.

reasonably be questioned. The Eleventh Circuit's opinion below is consistent not only with this holding, but also with the legal principles expressed in the opinion. Moreover, the Eleventh Circuit opinion is consistent with opinions issued by other circuit courts of appeal. Petitioners have wholly failed to demonstrate a departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision, and this petition should be denied.

Under 28 U.S.C. § 455(a), a judge shall recuse himself under the following circumstances:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

The statute (reproduced in its entirety in the appendix to the petition for a writ of certiorari) does not provide a remedy for violation of the duty to recuse. In Liljeberg v. Health Services Acquisition Corp., 468 U.S. ____, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988), one of the issues before this Court was the type of relief available under the statute. Declining to follow the Fifth Circuit's determination that reversal and/or vacatur is always required where a judge has constructive knowledge of a violation of the statute, the Court stated:

> A conclusion that a statutory violation occurred does not, however, end our inquiry. As in other areas of the law, there is surely room for harmless error committed by busy judges who inadvertently overlook a disqualifying circumstance. There need not be a draconian remedy for every violation of § 455(a).

108 S.Ct. at 2203. In coming to this conclusion, the Court noted that § 455 does not, on its own, authorize the reopening of closed litigation. Id. Although a motion to vacate a judgment may be filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, the Court stated judgments may be vacated "whenever such action is appropriate to accomplish justice," citing Klapprott v. United States, 335 U.S. 601, 614-15, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949), but that such action should be applied only in "extraordinary circumstances," citing Ackermann v. United States, 340 U.S. 193, 71 S.Ct. 209, 95 L.Ed. 207 (1950). Id. at 2204. Thus, the Court concluded:

> Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for all § 455 violations. We conclude that

> in determining whether a judgment should be vacated for violation of § 455, it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

Id.

Although the appeal below did not come before the Eleventh Circuit on a Rule 60(b)(6) motion, the principles enunciated in Liljeberg nevertheless apply. The circuit court below correctly determined that, under the three Liljeberg factors, Judge Lynne's refusal to recuse himself constituted harmless error and declined to reverse the summary judgment order. First, the court concluded that there was no risk of injustice to the parties involved if relief was denied. Because the appellate

court affirmed the district court's grant of summary judgment upon plenary review, the risk of injustice to petitioners in this case was slight, particularly in view of the fact the district court had announced its tentative decision to grant defendants' motion for summary judgment prior to Somerville's joining his staff. Second, the court determined that denying relief in this case would not produce injustice in other cases. Finally, the court concluded that the public's confidence would not be undermined because reversal of a correct summary judgment order, only to be reentered by some other judge, would more likely undermine public confidence.

The Eleventh Circuit also concluded that the harmless error doctrine is

applicable to 28 U.S.C. § 455(b).[5] As stated by the appellate court, this conclusion is supported by the absence of any distinction drawn between § 455(a) and (b) by this Court in Liljeberg in outlining the test for determining whether a judgment should be vacated due to a violation of the statute. In addition, stated the court, this Court demonstrated its intention that the test be applied to all § 455 violations by the following statement: "Rule 60(b)(6) relief is accordingly neither categorically available nor categorically unavailable for all § 455 violations." (emphasis added by appellate court)

The Eleventh Circuit's ruling below is not only consistent with the opinion in Liljeberg but also with past opinions

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[5] The Eleventh Circuit did not reach the question of whether a § 455(b)(5)(iii) violation occurred in the district court.

of that court and with the opinions of other circuit courts. Under these opinions, failure to recuse does not mandate reversal or vacatur where the same conclusion on the merits is reached by the reviewing court. See Lyons v. Sheetz, 834 F.2d 493, 495 n. 1 (5th Cir. 1987) (even if the judged should have disqualified himself for impartiality, failure to do so is harmless error where no other judge could reasonably have reached a different result on the merits); Phillips v. Amoco Oil Co., 799 F.2d 1464, 1472 (11th Cir. 1986) (reversal of a summary judgment order is not required where the order is subject to de novo review; in such a case, the district court is not called upon to resolve conflicts in evidence, weigh the credibility of witnesses, or exercise judicial discretion); see also Barry v.

United States, 528 F.2d 1094, 1100 (7th Cir. 1976), cert. denied, 429 U.S. 826 (1976) (any error in the judge's failure to disqualify himself was harmless where, at the end of trial, defendants stated to the judge he had been impeccably fair and just, and where his ruling of law on one point was the same as that reached independently by the appellate court).

The Seventh Circuit, although utilizing a different approach, has also concluded that violations of § 455 do not mandate reversal or vacatur. In United States v. Murphy, 768 F.2d 1518 (7th Cir. 1985), cert. denied, 106 S.Ct. 1188 (1986), the court determined that, where § 455(a) was violated, the disqualification ran only from the time the motion to recuse was filed. Stating that "the appearance of impropriety is not enough to poison the prior acts," the

court held judicial action taken before the motion may not be set aside unless the movant shows actual impropriety or actual prejudice. Id. at 1541. See also Falconer v. Meehan, 804 F.2d 72, 78 (7th Cir. 1986) (even if recusal is found to be mandated under § 455(a), only action taken after the motion is filed must be set aside); United States v. Widgery, 778 F.2d 325, 327-28 (7th Cir. 1985) (even a successful motion to recuse does not vitiate action taken before the filing of the motion).

Finally, the Eleventh Circuit's opinion is consistent with 28 U.S.C. § 2111 ("On the hearing of any appeal or writ of certiorari in any case, the Court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.") and cases

decided under that statute. See e.g., Chapman v. State of California, 386 U.S. 18, 22, 87 S.Ct. 125, 127, 17 L.Ed.2d 705 (1967) (where constitutional error is harmless, automatic reversal is not required; the Court declined to adopt the rule that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful).[6]

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[6] The cases cited by petitioners in support of their arguments pertaining to 28 U.S.C. § 455(b)(5)(iii) do not support their arguments concerning either § 455(a) or (b). Because the opinions were decided prior to Liljeberg, those courts did not address the issue of harmless error or apply the three Liljeberg factors in determining the appropriate remedy for § 455 violations. Nor did any of those cases involve appeals from orders granting summary judgment, and the issue of harmless error in the context of plenary review did not arise. Moreover, the language in those cases to the effect that under § 455 recusal is mandatory and reversal or vacatur is always required is rendered suspect in light of this Court's holding in Liljeberg that remedies for violations of § 455 are to be fashioned according to certain guidelines.

Petitioners have failed to demonstrate any basis for granting their petition for a writ of certiorari. The Eleventh Circuit opinion below is consistent with the principles announced by this Court, with the opinions issued by other circuit courts of appeal, and with federal statutory law. The Eleventh Circuit correctly applied the holding in Liljeberg that remedies for § 455 violations are to be fashioned according to the facts and circumstances of each case, and the opinion below should not be reviewed.

II. Petitioners' Baseless Assertion that "The Law Clerk Became the Judge" in Violation of 28 U.S.C. § 455(b)(5)(iii) is Without Evidentiary Foundation and is not Worthy of this Court's Attention.

Petitioners argue that Judge Lynne's law clerk "became the judge" in direct violation of § 455(b)(5)(iii) by virtue

of his analysis of the evidence in the record, his assistance in the formulation of the summary judgment opinion, and his participation in a "hearing" held in Judge Lynne's absence during which the parties discussed their legal positions. Petitioners cite no legal authority for this proposition. Section 455(b)(5)(iii) sets forth very specific circumstances in which a judge must disqualify himself from presiding over a case. The statute does not require recusal where the father of the judge's law clerk is a partner in the firm representing one of the parties. That such a law clerk can "become the judge," thereby requiring recusal, is supported by neither the language of the statute nor the case law developed thereunder.[7]

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[7] The cases cited by petitioners do not address the issue of whether a law clerk can "become the judge" and therefore do not support

Moreover, petitioners' assertion that the law clerk decided whether there were genuine issues of material fact and that Judge Lynne accepted his conclusions without analyzing the record himself is belied by the district court's statement in its opinion that the clerk, after reviewing the record, discussed with the judge how the law should be applied to undisputed facts. Finally, the implication that Judge Lynne merely signed off on a memorandum opinion written by the clerk without independent analysis and concurrence is a serious allegation which again has no basis in fact, and which indeed is contradicted by the court's

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petitioners' assertion that a law clerk can become a judge's "alter ego" in violation of § 455(b). One of these cases, Hall v. Small Business Administration, 695 F.2d 175 (5th Cir. 1983), was decided under § 455(a), not § 455(b). Moreover, as stated supra, pp. 10-11, the cases do not support the proposition that the harmless error doctrine is inapplicable to cases under § 455(b).

announcement -- made two years before the law clerk joined the court's staff -- that it tentatively had decided to grant defendants' motion for summary judgment. Petitioners' assertions regarding § 455(b)(5)(iii) are baseless and should be disregarded as such.

III. Petitioners' State Law Fraud Claims Against the Company are Preempted under the National Labor Relations Act.

Under San Diego Building and Trades Council v. Garmon, 359 U.S. 236, 245, 79 S.Ct. 773, 779, 3 L.Ed.2d 775 (1959):

> When an activity is arguably subject to Section 7 or Section 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.

Petitioners do not contest the Eleventh Circuit's determination that their state law fraud claims are "arguably subject" to the Act and therefore preempted.[8] Rather they argue their claims fall within one of the three exceptions recognized in Garmon. The exception that applies "where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in

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[8] Petitioners' attempts to distinguish Serrano v. Jones and Laughlin Steel Co., 790 F.2d 1279 (6th Cir. 1986), are unconvincing. In Serrano, Jones and Laughlin Steel Co. ("J & L") negotiated a concession agreement with the Union in order to avoid a shutdown of one of its coke plants. Despite the concession agreement, J & L closed the plant down. The employees filed suit charging, in part, several state law fraud claims based upon defendant's alleged misrepresentations that it would modernize its coke facilities if the Union agreed to certain concessions. As noted by the Eleventh Circuit below, the Serrano Court was presented the same arguments as were presented by petitioners in this case, and the court correctly held that the fraud claims were preempted. Petitioners' statement that Serrano is distinguishable from this case because the plaintiffs in Serrano were "strike breakers" is a misstatement of facts in Serrano.

the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act," the petitioners argue, applies to state law claims of fraud and breach of contract under Belknap, Inc. v. Hale, 436 U.S. 491, 103 S.Ct. 3172, 77 L.Ed.2d 793 (1983).

In Belknap, this Court recognized a fraud and breach of contract exception for "strike breakers" or "permanent replacements" who were first hired by the employer to replace striking employees, and then fired by the employer after the employer settled an unfair labor practice charge with the union initiating the strike. Noting that the replacements were not union members and therefore their rights would not have been the focus of proceedings on an unfair labor practice charge, the court held their

fraud and breach of contract claims were not arguably subject to the National Labor Relations Act and therefore were not preempted. Further, the court noted the state had an interest in protecting the permanent replacements because the Labor Board would not have protected them.

By contrast, matters are significantly different in this case. Here, it is the employees themselves who are suing the Company for fraud, and the Eleventh Circuit properly found the fraud claims were preempted.[9]

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[9] Petitioners cite Linn v. United Plant Guard Workers, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), for the proposition the state has a Garmon exception interest in seeing that a remedy is provided for a large group of its citizens who have been defrauded. Linn involved an action by a company manager for defamation in the course of a labor organization campaign. This Court held the exercise of state jurisdiction in such an action would be a "merely peripheral concern of the Labor Management Relations Act," and held the defamation claim was not preempted. 383 U.S.

IV. Plaintiffs' State Law Fraud Claims Against The Company Are Barred By The Arbitration Award.

Separate and apart from the fact that plaintiffs' state law fraud claims are preempted under §§ 7 and 8 of the Labor Act, the Eleventh Circuit also correctly concluded that plaintiffs' claims are barred by the arbitration award. This is buttressed by plaintiffs' failure to take issue in their petition with this aspect of the Eleventh Circuit's holding.

The collective bargaining agreement in this case contained a mechanism for the exclusive adjustments of grievances and complaints thereunder. Specifically,

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at 61, 86 S.Ct. at 662. This holding is inapplicable to this case, where the fraud claims are based upon negotiations which are undeniably subject to the National Labor Relations Board's jurisdiction, and indeed are practically indistinguishable from the unfair labor practice charges presented by petitioners to the Board.

it was stated at § 9C of the agreement as follows:

> Should differences arise between the Company and the Union as to the interpretation or application of or compliance with the provisions of this Agreement or as to any question relating to the wages, hours of work, and other conditions of employment or any change therein . . . an earnest effort shall be made to settle the matter promptly in accordance with the following procedure. . . . [Emphasis added].

This Court has long held that clauses such as the foregoing should be read with a "presumption of arbitrability," and that "[d]oubt should be resolved in favor of coverage." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). This presumption, coupled with the facts that (i) the Company and the Union in fact arbitrated numerous disputes over the effects of the plant

closing and (ii) Connors issued checks totaling $243,932.66 to 583 former bargaining unit members based upon the arbitrator's findings, provided ample justification for the court's following Mason v. Continental Group, Inc., 763 F.2d 1219 (11th Cir. 1985), cert. denied, 474 U.S. 1087 (1986). In Mason, the Eleventh Circuit, in a very similar situation, held that employees were required to submit "arguably extrinsic claims, such as fraud, to the grievance and arbitration process." Id. at 1223.

Accordingly, apart from the issue of preemption under the Labor Act, plaintiff's claims of fraud against the Company were properly held to have been merged into and barred by the arbitration award.

V. The District Court Correctly Granted Summary Judgment of Plaintiffs' Hybrid § 301/Fair Representation Claims.

Plaintiffs, at pp. 25-29 of their petition, argue that the District Court improperly granted summary judgment in favor of the Union and the Company on plaintiffs' hybrid § 301/fair representation claims. Aside from the fact that the District Court's decision, and the Eleventh Circuit's affirmance of that decision, are correct and fully consistent with the precedent of this Court and the Eleventh Circuit, all of the arguments made by plaintiffs against this aspect of the district court's decision concern the actions of the Union during the negotiation and ratification of the two concession agreements. Thus, no lengthy response as to these matters is necessary nor shall any be forthcoming from the Company.

At p. 25-26 of their petition, plaintiffs argue that the hybrid § 301/breach of contract claim is not preempted under the Labor Act. No contention was made below, nor did the Eleventh Circuit hold, that such claims were preempted. The district court found (and the Eleventh Circuit affirmed this finding) that there was no genuine issue of material fact with respect to the question whether the Union breached its duty of fair representation in the negotiation or ratification of the concession agreements. Nor was any evidence produced showing that the Union breached its duty of fair representation in connection with the grievances submitted to arbitration in October of 1983.

The Eleventh Circuit's application of the law to the undisputed facts in the

record concerning the union's actions during the negotiation and ratification of the concession agreements was thorough, well reasoned, and sound. The Eleventh Circuit's opinion is thus not appropriate for review on certiorari.

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